

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

No. 9694
JOINT APPENDIX TO BRIEF

740

United States Court of Appeals

DISTRICT OF COLUMBIA

CORNELIUS H. DOHERTY, Executor of the Estate of
CHRISTINA BUCHHOLZ, *Deceased,*

Appellant,

v.

LOUISE STONER, GUSTAV F. BLANK, and WILHELMINA
MERKLE, Committee for FREDERICK W. MERKLE,

Appellees.

Appeal from the District Court of the United States
for the District of Columbia

United States Court of Appeals
for the District of Columbia

FILED

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Frederick W. Stoner
CLERK

INDEX

	PAGE
Last Will and Testament of Christina Buchholz, deceased, admitted to Probate and Record on February 1, 1945	2
Order for Probate and Letters Testamentary	4
First Account of Cornelius H. Doherty, Executor	5
Second Account of Cornelius H. Doherty, Executor	19
Exceptions by Residuary Legatees to Second Account of Executor	24
Answer to Exceptions to Second Account of Executor	31
Restated Second Account of Cornelius H. Doherty, Executor	43
Supplemental Exceptions to Executor's Second Account, and Exception to Restated Second Account	47
Order Sustaining Certain Exceptions	57
Statement of Points	58
Examination of Cornelius H. Doherty, Executor	59

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for the District of Columbia

JOINT APPENDIX TO BRIEFS

ITEM I: I direct my Executor, hereinafter named, to pay all of my just debts and the expenses of my last illness, funeral and burial in such amounts as he may deem proper, as soon after my death as may be practicable.

ITEM II: I give and bequeath the sum of Three Thousand Dollars (\$3,000.00) unto William Buchholz, of Washington, District of Columbia, if he shall survive me, or, if not, unto his wife, if she shall survive me, or, if neither of them shall survive me, then, *per stirpes*, unto his issue surviving at my death.

ITEM III: I give and bequeath the sum of One Thousand Dollars (\$1,000.00) unto Hedwig Merkle, of Arlington, Virginia, if she shall survive me, or, if not, unto her daughter, Catherine Merkle, if she shall survive me, but, if neither of them shall survive me, this legacy shall lapse.

ITEM IV: I give and bequeath unto Freda Blank, of the City of New York, in the State of New York, the sum of One Thousand Dollars (\$1,000.00), if she shall survive me, but if she shall predecease me, this legacy shall lapse.

ITEM V: I give and bequeath unto Anna Fischer, of the City of New York, State of New York, the sum of One Thousand Dollars (\$1,000.00), if she shall survive me, but if she shall predecease me, this legacy shall lapse.

2 ITEM VI: If Raymond A. Deaner, of Washington, D. C., shall survive me, and be employed at the Occidental Hotel, in said City at the time of my death, I give and bequeath unto him the sum of Two Thousand (\$2,000.00), but, if he shall predecease me, but his son, Raymond A. Deaner, Jr., shall survive me, I give and bequeath the said sum unto said Raymond A. Deaner, Jr., but, if neither of them shall survive me, this legacy shall lapse.

ITEM VII: I give and bequeath unto each of the following persons who may survive me and be employed at

the said Occidental Hotel in the City of Washington at the time of my death the respective sums stated, namely:

(a) Unto Charles B. Simmons, the sum of Two Thousand Dollars (\$2,000.00).

(b) Unto Albert Herbert the sum of Five Hundred Dollars (\$500.00).

ITEM VIII: I give and bequeath unto Dorothy Buchholz of the City of Washington, District of Columbia, the sum of One Thousand Dollars (\$1,000.00).

ITEM IX: I give and bequeath unto Cornelius H. Doherty, Jr., Ann Doherty, Jean Doherty and Joan Doherty of the State of Virginia, the sum of Fifteen Hundred Dollars (\$1500.00) each.

ITEM X: I give and bequeath to Herbert Kreischer of the City of Washington, District of Columbia, the sum of One Thousand Dollars (\$1,000.00).

ITEM XI: I give and bequeath to my brother-in-law, Julius Buchholz, the sum of Three Thousand Dollars (\$3,000.00) if he shall survive me, but, if he shall predecease me, this legacy shall lapse.

ITEM XII: I give and bequeath unto the Concordia Lutheran Church, at present located at Twentieth and G Streets, Northwest, in the City of Washington, District of Columbia, the sum of One Thousand (\$1,000.00), and I direct that the receipt of the proper officer or officers of said Church shall constitute the full discharge and acquittance of my Executor, whether said Church be incorporated or unincorporated.

ITEM XIII: I give and bequeath unto the German Orphan Asylum, at present located on Good Hope Hill, in the District of Columbia, the sum of Two Thousand Dollars (\$2,000.00), and I direct that the receipt of the proper officer or officers of said German Orphan Asylum shall con-

stitute a full discharge and acquittance of my Executor whether the same be incorporated or unincorporated.

ITEM XV: All of the rest, residue and remainder of my property and estate, both real and personal, of whatever kind and wheresoever situate or located, of which I may die seized or possessed, or to which I may be in any wise entitled at the time of my death, I direct my Executor, in his discretion, to reduce to cash and divide it equally among the following: Louise Stoner, Gustav Blank and Fred Merkle, the issue, however, if any, surviving at my death, of any of the foregoing who may predecease me, to take, *per stirpes*, the same part or share that the deceased ancestor would have taken if surviving me.

ITEM XVI: I hereby name, constitute and appoint Cornelius H. Doherty, an attorney of the District of Columbia, to be the Executor of this my last will and testament, and I request that no bond or undertaking be required of him, either in this or in any other jurisdiction wherein he may deem it necessary or advisable to qualify, and that he be allowed the maximum compensation permitted by law.

I hereby give to my Executor full power and discretion in the management and control of my estate, with the right and power to sell all, or any portion thereof, which he may deem necessary or advisable for the payment of my just debts, the settlement of my estate, or in the best interests of my estate; and no purchaser from my Executor shall be under any obligation to see to the application of the purchase money.

* * * *

5 *Order for Probate and Letters Testamentary*

Upon consideration of the petition of Cornelius H. Doherty for probate and for letters testamentary filed herein on the 19th day of January, 1945, and it appearing

to the satisfaction of the Court that the last will and testament of Christina Buchholz, deceased, bearing date the 12th day of December, 1944, has been duly proven, and that all necessary process has been completed against all the adult heirs at law and next of kin of said decedent, and that the answer of the guardian ad litem appointed herein for Christine Kathryn Buchholz, infant heir at law and next of kin, has been filed and no objections having been filed, it is by the Court this first day of February, 1945,

ADJUDGED, ORDERED and DECREED That the said will be and is hereby admitted to probate and record as a will of real and personal property, and that letters testamentary are granted and shall issue to Cornelius H. Doherty, the Executor named in said will, provided that Cornelius H. Doherty first files his undertaking in the penal sum of Seventy-Five Thousand Dollars (\$75,000.00) with surety approved by the Court, conditioned for the faithful performance of his trust, provided he files the power of attorney required of non-residents.

By the Court:

JAS. W. MORRIS,

Justice.

* * * *

6 First Account of Cornelius H. Doherty, Executor
Letters issued February 1, 1945

Assets Received	Disburse- ments
--------------------	--------------------

This executor charges himself with the following assets received:

U. S. Treasury Bonds, redeemed	\$20,000.00
Cash from American Express Co.	2,980.00

Withdrawn from Progressive Building and Loan Association	7,268.00	
On deposit Munsey Trust Company	1,783.21	
Withdrawn from National Metropolitan Bank including interest Checking Account National Metropolitan Bank	1,715.57	
	44,219.73	(25,166.67)
		Amendments
First trust note secured by part of Lot A Square 247	10,000.00	
Household effects appraised at	3,084.05	
Jewelry appraised at (sold)	25.50	
(Watch appraised at \$20, sold under order of Court)		
Books appraised at	50.50	
1941 Ford Truck appraised at	470.00	
1942 Packard Touring limousine appraised at (sold under order of Court)	2,235.00	
1940 Packard Touring sedan appraised at	985.00	
(sold under order of Court)		
Proceeds of sale of 25 \$100 6% 1st Deed of Trust Bonds, Washington Auditorium Corp.		

appraised at \$2,062.50 ..	2,312.50
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Amounts carried forward	97,129.06
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7 Brought forward,	97,129.06
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Hotel Stock and Fix- tures appraised at	63,309.40
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Proceeds of sale of 600 shares, New Class B Common Stock of R. J. Reynolds Tobacco Com- pany, appraised at \$20,- 250.00	22,564.85
---	-----------

(sold under order of
Court)

200 shares Capital Stock, Packard Motor Car Company appraised at	1,200.00
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100 shares Capital Stock, Packard Motor Car Company, carried at	600.00
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Proceeds of sale of 100 shares Capital Stock, Briggs and Stratton Corporation appraised at \$4,225.00 sold for	5,463.39
--	----------

(sold under order of
Court)

Cert. No. NY 1984 for 100 shares Capital Stock Pacific Western Oil Cor- poration appraised at ..	2,000.00
---	----------

Proceeds of sale of lots
18, 26 and 27 Square
5643 sold by executor
under terms of Will and

and under order of Court	52,000.00	
Adjustment of Insurance, taxes, etc. at date of sale	628.93	
Proceeds of sale of lots 802 and 806 Square 2819 sold by executor under terms of Will and under order of Court	53,000.00	
Proceeds of sale of lots 42, 43 and 803 Square 127 sold by executor under terms of will and under order of Court ...	60,000.00	
Adjustment of taxes on same	66.90	
Proceeds of sale of Parcels 144/12, and 144/44 in Square 4021 sold by executor under terms of Will and under order of Court	40,000.00	
Adjustment of taxes on above property	192.82	
To correct item in Inventory of Money and Debts of cash received from the National Metropolitan Bank of Washington (Savings)-		797.71
In accordance with Order of Court of March 18, 1946.		
Amounts carried forward,	398,155.35	797.71
Brought forward,	398,155.35	797.71

		Assets Received	Disburse- ments
1945			
June 5	Interest on U. S. Treas- ury Bonds (redeemed as of this date)	112.50	
Sept. 10	Int. on 1st trust note secured by part of Lot A Square 247 Dividends on R. J. Rey- nolds Tobacco Co. 2-16-45 5-18-45 8-30-45 12-31-45 extra	200.00 210.00 210.00 210.00 120.00	
Apr. 3	Dividends on Packard Motor Car Company Dividends on Briggs and Stratton Corp. 3-16-45 6-26-45 9-15-45 12-20-45	45.00 48.51 48.00 48.51 48.51	
Dec. 31	Dividends on Pacific and Western Oil Corp. ... Rent from premises lo- cated on Lots 18, 26 and 27 Square 5643—Jan- uary 1945 thru Decem- ber 1945 (net) sold (ex- cept Sept.) Rent from premises lo- cated on Lots 802 and 806 Square 2819—Feb- ruary 1945 thru April 1945 (net) sold	50.00 2,845.52 725.01	

Rent from premises located on Lots 42, 43 and 803 — February 1945 thru May 1945 (net) sold	823.08	
Rent from premises located on parcels 144/12, and 144/44 in Square 4021 — February 1945 thru June 15, 1945 (net)	1,500.00	
Rent from premises 205 17th St. S. E. February 1945 thru July 1945 (net)	210.00	
He claims credit and allowance for the following disbursements:		
The Washington Post, notice to creditors		11.25
The Washington Law Reporter, notice to creditors		10.20
Register of Wills		539.23
Howard and Hoffman, bond premium		360.00
Amounts carried forward,	405,609.99	1,718.39
	Assets Received	Disbursements
9 Brought forward,	405,609.99	1,718.39
T. R. Imlay, real estate appraisal		50.00
F. Latimer Barkley, real estate appraisal		50.00

Collector of Taxes, D. C., real estate 1945 taxes	601.88
Lucinda C. Bosworth, nurse	24.00
Frances Williams, nurse	8.00
Katherine H. Brown, nurse	48.00
Louise Stoner, reim- bursement for medi- cines	6.78
Gus Blank, reimburse- ment for opening grave	30.00
Emergency Hospital	90.10
Collector of Taxes, D. C. special assess- ment on 205 - 17th St. S. E.	17.00
The Washington Post, publication nisi	4.95
The Washington Law Reporter, publication nisi	5.46
Blaydes Safe and Lock Co.	28.00
Collector of Internal Revenue, income tax	4,819.71
Collector of Taxes, D. C., water rent 205 17th St. S. E.	9.63
T. R. Imlay, real estate appraisal	50.00
F. Latimer Barkley, real estate appraisal	50.00
The Washington Law Reporter, publ. nisi	5.46
The Washington Post, publ. nisi	4.95

Jos. Gawlers Sons Inc. funeral expenses	3,530.50
John R. Monroe, organ- ist	10.00
Harry Luetphye, sexton	5.00
Reverend Charles En- ders	100.00
(Will directs payment of funeral and burial by executor "in such amounts as he may deem proper".)	
Collector of Taxes, D. C. income tax	520.05
A. K. Reynolds, real estate appraisal	15.00

10	Amounts carried forward,	405,609.99	11,802.86
	Brought forward,	405,609.99	11,802.86

	Assets Received	Disburse- ments
Edward A. Garvey, real estate appraisal		15.00
Charles C. Koonen, real estate appraisal		20.00
Harvey L. Jones, real estate appraisal		20.00
Gus Blank, reimburse- ment for Washington Garage bill		44.50
The Washington Law Reporter publ. nisi		6.30
The Washington Post, publ. nisi		5.85
Dr. J. Ernest Mitchell..		50.00
Dr. Wm. B. Marbury		500.00

Dr. Walter K. Myers	320.00
Howard and Hoffman..	20.00
R. Ernest Smith, Treas- urer, taxes on lots in Md.	24.38
The Munsey Trust Com- pany, safety deposit box repairs	7.00
Collector of Taxes, D. C. real estate taxes..	185.11
Hulmut Winterfeldt, German translation	25.00
Lafayette Franklin, real estate appraisal	25.00
Andrew K. Reynolds, real estate appraisal	25.00
National Metropolitan Bank, safety deposit box repairs	8.00
The Washington Law Reporter, publ. nisi	5.67
The Washington Post, publ. nisi	5.25
Legg Griffith Co. Inc. bal. on ins. premium	.94
Collector of Internal Revenue, payment on 1945 income tax	1,116.79
National Metropolitan Bank, note dated Dec. 1, 1944 for \$25,000.00 with Int. 4%	25,166.67
Amounts carried forward,	405,609.99
Brought forward,	405,609.99
	39,399.32
	39,399.32

	Received Assets	ments Disburse-
Commission on sale of lots 18, 26 and 27		2,560.00
Payment of 1st trust on Lot 18		11,455.62
Interest on same from Jan. 14th to Jan. 31		20.04
Payment of 1st trust on Lot 26		11,479.29
Interest on same from Jan. 14th to Jan. 31		20.09
Payment of 1st trust on Lot 27		11,479.29
Interest on same from Jan. 14th to Jan. 31		20.09
Taxes on above lots as of date of settlement		20.77
Refund of rents on above property to date of settlement		377.61
Revenue stamps		19.80
Title Company's state- ment of sale filed herein.		
Commission on sale of lots 802 and 806 Square 2819		2,590.00
Refund of rent on above to date of settlement		105.00
Revenue stamps		58.30
Commission on sale of lots 42, 43 and 803 Square 127		2,500.00
Payment of 1st trust on above		20,000.00
Interest on same from Nov. 14th to date of set-		

tlement	522.50
Title Company charges	85.00
Commission on sale of Parcels 144/12 and 144/44 in Square 4021....	2,000.00
Incidental expenses, no- tary fees, long distance calls, telegrams, etc.	65.00
Balance	300,832.27

12	Amounts carried forward,	405,609.99	405,609.99
	Brought forward, Balance	300,832.27	

	Received Assets	ments Disburse-
Above balance distribut- able in accordance with last will and testament:		
William Buchholz, leg- acy		\$3,000.00
Hedwig Merkle, legacy..		1,000.00
Freda Blank, legacy		1,000.00
Anna Fischer, legacy		1,000.00
Raymond A. Deaner, legacy		2,000.00
Charles B. Simmons, legacy		2,000.00
Albert Herbert, legacy..		500.00
Dorothy Buchholz, leg- acy		1,000.00
To Mary C. Doherty, guardian for Cornelius H. Doherty, Jr., Ann Doherty, Jean Doherty and Joan Doherty, leg- acy of \$1500. each (ap- pointed in Virginia		

copy filed herein.)	6,000.00
Herbert Kreischer, legacy	1,000.00
Julius Buchholz, legacy	3,000.00
Concordia Lutheran Church, legacy	1,000.00
German Orphan Asylum, legacy	2,000.00
Household effects and books appraised distributable to Louise Stoner, Gustav Blank and Fred Merkle	3,134.55
Partial distribution to residuary legatees	
Louise Stoner	10,000.00
Gustav Blank	10,000.00
Wilhelmine Merkle, Committee for Frederick William Merkle, Mental Health No. 29571	10,000.00
Balance for future accounting	243,197.72

Amounts carried forward, \$300,832.27 \$300,832.27

13

Brought forward,

The following securities appraised at no ascertainable market value distributable to the residuary legatees:
 Louise Stoner, 1/3d
 Gustav Blank, 1/3d
 Wilhelmine Merkle, Committee for Frederick William Merkle, Mental Health No. 29,571, 1/3d

20 shares, Capital Stock,
Occidental Oil Corpora-
tion.

Cert. No. 720 for 100
Beneficial Units Pow-
hatan Petroleum Com-
pany

60 shares Common
Stock, Great Western
Corporation

Cert. No. 27 for 50
shares, Preferred Stock
Great Western Corpora-
tion

Cert. No. 775 for 50
shares Capital Stock
Washington Auditorium
Corporation.

Report Under Rule 49

Cash on hand	147,308.61
1941 Ford Truck app'd. at	470.00
200 shs. Capital Stock Packard Motor Car Co. app'd. at	1,200.00
100 shs. Capital Stock Packard Motor Car Co. carried at	600.00
Cert. No. NY 1984 for 100 shs. Capital Stock, Pacific Western Oil Corp. app'd. at	2,000.00
1st Trust Note sec. by part Lot A Square 247 (Dilli)	10,000.00
Stock & Fixtures app'd.	63,309.40

Net profit from business
thru October 1945 18,309.71

\$243,197.72

Assets
Received

Disburse-
ments

14 *Business Schedule*

1945

Account of operation of
business of decedent
under order of Court.

Feb.	Net profit	\$ 7,018.72	
March	Net profit	8,444.36	
April	Net profit	11,063.46	
May	Net profit	8,624.45	
June	Net profit	683.22	
July	Loss		\$10,656.02
August	Loss		11,914.38
Sept.	Loss		4,134.58
Oct.	Net profit	9,180.48	
Monthly operating statements in support of above have been filed herein.			

\$45,014.69

\$26,704.98

Net profit in business
thru October 1945
\$18,309.71 carried under
Rule 49 page 8.

• • • •

16 *In the District Court of the United States for the
District of Columbia*

Holding a Probate Court

On this 10th day of July, A. D. 1946, the foregoing account, being now presented for approval, the same is, after examination by the Court, approved and passed.

T. ALAN GOLDSBOROUGH,
Justice.

* * * *

17 Second Account of Cornelius H. Doherty, Executor
Letters issued February 1, 1945

This executor charges
himself with the follow-
ing assets received:

Cash on hand as shown by 1st account	165,618.32
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Proceeds of sale of 1941 truck appraised at \$470. sold for	535.00
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Proceeds of sale of 200 shares Packard Motor Car Company appraised at \$1200.00 sold for	2,452.43
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Proceeds of sale of 100 shares Packard Motor Car Company carried at \$600. sold for	1,226.34
--	----------

Proceeds of sale of 100 shares Pacific Western Oil Corp. appraised at \$2,000. sold for	2,775.59
--	----------

First Trust Note sec. by
part Lot A Square 247

(Dilli) paid in full Sept. 10/46	10,000.00
Interest on said note March 23, 1946	200.00
Interest on said note Sept. 10, 1946	200.00
September rent not re- ported in 1st account re- ceived from premises located on Lots 18, 26 and 27 Square 5643	263.87
Proceeds of sale of Lot 43, Square 1087 205 17th St. S. E.	3,412.53
Cash withdrawn from National Savings and Trust Company	46.69
Adjustment on sale of lots 42, 43 and 803 Square 127	500.00
Adjustment of insur- ance on real estate	23.76
Russell Bargamin debt due estate	50.00
Russell Bargamin debt due estate	20.00
Gustav Blank, debt due estate	66.72
Refund of taxes paid prior to death	302.10

Amounts carried forward, \$187,693.35

Brought forward, 187,693.35

This executor claims
credit and allowance for
the following disburse-
ments:

To Abram F. Myers, guardian ad litem fee under order of Court	250.00
Howard and Hoffman, bond premium	360.00
Francis Attig, tran- script	25.00
Collector of Taxes, D. C.	53.68
Collector of Internal Revenue, income tax	8,727.46
Collector of Taxes, D. C. income tax	229.41
Collector of Internal Revenue, estate tax	44,610.40
John McGinley, testi- mony	35.00
H. Gabriel Murphy, additional insurance due on real estate	32.54
John McGinley, audit- ing records	360.00
Costs on Appeal	5.00
Register of Wills, costs	8.04
Clerk, Court of Appeals	35.00
Register of Wills, costs	135.60
Collector of Taxes, D. C. inheritance tax	12,036.79
Wilson-Epes Printing Company	126.80
Capital City Monumen- tal Works	175.00
Settlement of claim of District Trucking Com- pany	72.50
Following partial dis- tribution under order	

of Court:

Louise Stoner	30,000.00
Gustav Blank	30,000.00
Wilhelmine Merkle, Committee for Freder- ick William Merkle, Mental Health No. 29,571	30,000.00

Amounts carried forward,	\$187,693.35	\$157,278.22
Brought forward,	187,693.35	157,278.22

19

Assets Received	Disburse- ments
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Proceeds of sale of busi- ness under order of Court of January 25, 1946	\$77,506.13
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Stock and fixtures ap-
praised at \$63,309.40

Operations of business
from last accounting to
date of sale

Forwarded from 1st ac- count	18,309.71
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Profit for November 1945	3,471.36
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Loss for December 1945	5,718.42
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Profit for January 1946	5,200.22
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Profit for January 1946	5,200.22
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Additional expenses for purchase of equipment and improvements	3,148.73
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Accounts receivable
amounting to \$1,069.08
reflected in above re-
ported profit.

Commission of 10%
claimed on disburse-
ments including partial
distribution first and
second accounts 32,155.89

Disbursements 1st acct. \$104,777.72

Less refunds & adjust-
ments 1,280.32

\$103,497.40

Plus Distribution 1st
a/c 57,634.55

\$161,131.95

Disbursements 2d acct... 70,426.95

\$231,558.90

Plus Distribution 2nd
a/c 90,000.00

\$321,558.90

The Will of decedent
states that the executor
"be allowed the maxi-
mum compensation per-
mitted by law."

Balance on hand 93,879.51

\$292,180.77 \$292,180.77

Report Under Rule 49.

Cash on hand 92,810.43

Accounts receivable 1,069.08

\$93,879.51

* * * *

22 *Exceptions in Opposition to Commission as Stated
by the Executor and to His Second Account*

Now come the residuary legatees of decedent, Mrs. Louise Stoner, Gustav Blank, and Fred W. Merkle, Patient, by his Committee Mrs. Wilhelmine Merkle, who except to and oppose approval of the account filed herein by Cornelius H. Doherty, Esq., executor of Christina Buchholz, deceased, and for exception thereto, said residuary legatees show to the Court:

1. That they have been given notice by said executor that he will claim as his commissions ten per cent of his disbursements to date, that is the sum of \$32,155.89.

2. That said commissions are excessive and the Court is not warranted in approving the same for the following reasons:

(a) That said executor at the time he prepared for deceased her said last will and testament well knew that he had been named as co-executor with the National Metropolitan Bank of Washington in the last will of decedent's son, Fred W. Buchholz, who had died November 22, 1944, prior to the date of the making of the will probated herein, and that there were bound to be conflicting interests which would make it impossible for him to act as a faithful executor for both the estate of the late Christina Buchholz and the estate of the late Fred W. Buchholz.

23 (b) That the provision in the will of Christina Buchholz that her executor "be allowed the maximum compensation permitted by law" is not binding upon this Court and cannot be taken as depriving this Court of its discretion in the allowance of commissions to this executor.

3. That said commissions claimed by said executor should be disallowed by the Court by reason of the following further circumstances:

(i) That said Cornelius H. Doherty, executor of the estate of Christina Buchholz, has failed to cooperate with your exceptors, the residuary legatees of the estate of Christina Buchholz, and has to their detriment and damage favored the estate of Fred W. Buchholz; that he placed in his first account as payable from the assets of this estate the sum of \$36,196.64 as due and payable to himself as one of the executors of the estate of Fred W. Buchholz and he also placed in his first account a balance claimed due and payable to Joseph Gawler's Sons, Inc., in the sum of \$2,863.00, claiming that said amount was due by this estate for the funeral expenses of Fred W. Buchholz. This Court, on exception filed by your exceptors held that neither of said amounts were due by this estate to the alleged creditors named in said first account. That the executors for Fred W. Buchholz brought suit in an attempt to enforce the payment of the said sum of \$36,196.64 and Gawler's Sons, Inc. brought suit against this estate for the balance of \$2,863.00. Your exceptors were required to defend said suits and secured the dismissal of the same, this Court sustaining a motion to dismiss filed by attorneys employed by the residuary legatees. In the Municipal Court exceptors appeared and defended the Gawler claim, whereupon after trial, judgment was entered dismissing the Gawler suit against this estate and rendering judgment against the estate of Fred W. Buchholz.

24 (ii) That this estate was legally entitled to a certain lease upon the premises 1411 Pennsylvania Avenue, N. W., and residuary legatees demanded this executor to include the same as an asset of this estate. This executor refused to do so claiming without justification that said lease was the property of the estate of Fred W. Buchholz. Whereupon your residuary legatees were required to employ counsel and file suit to have this estate recognized as the owners of said lease and in said suit this executor was made defendant therein.

(iii) That this estate is due the sum of \$119,000.00 by the estate of Fred W. Buchholz on an accounting for a like sum received by Fred W. Buchholz during his lifetime for account of his mother, Christina Buchholz, being the proceeds of a sale of property belonging to her. That your executors demanded that this executor list said claim as an asset of this estate and proceed to collect the same from the estate of Fred W. Buchholz, all of which this executor refused to do making it necessary that your exceptors at their expense employ counsel who have brought suit against said estate of Fred W. Buchholz for the said sum of \$119,000.

(iv) That this executor converted all of the valuable real estate belonging to this estate into cash which was unnecessary and to the detriment and damage of your residuary legatees for this executor had in hand from assets other than real property sufficient funds with which to pay all of the debts of the estate; that the sale of said real estate involved the payment of appraiser fees and commissions to real estate agents which expense was unnecessary and contrary to the interest of your residuary legatees.

4. That this executor has not properly and faithfully administered this estate as a prudent administrator and has failed to collect sums due said estate, has paid
25 out monies unlawfully and improperly in the conduct of the business belonging to this estate, has incurred debts for himself to this estate which he not only failed to pay but caused improperly to have charged off to advertising and other alleged costs of the business; has purchased from himself as a fiduciary assets of said estate at wholesale prices when said estate was in the business of retailing goods, wares and merchandise, and has failed to account for the physical assets of this estate more particularly as follows:

(a) He has failed to charge himself with the profits of the operation of the Occidental Hotel and Restaurant for the period February 1, 1945 to October 31, 1945 in the sum of \$18,309.61; that the cash on hand reported by the executor in his second account and to which your residuary legatees except is reported as the sum of \$147,308.61, whereas said amount should have been reported as \$165,618.32.

(b) That this executor has failed to charge himself with the profits of the operations of the Occidental Hotel and Restaurant for the period from January 15, to January 31, 1945, which according to the audited accounts of the Occidental Hotel and Restaurant amounted to \$1,743.18.

(c) That in the operation of the Occidental Hotel under the orders of this Court this executor retained Raymond Deaner and Charles Simmons the former bookkeeper and manager of the Occidental Hotel and Restaurant and although said Deaner and Simmons performed no duties or assumed any responsibilities greater than those which had been charged to them prior to January 15, 1945 the said executor either improperly authorized or his said employees without his authority increased their salaries effective July 1, 1945 from \$85.00 per week to \$110.00 per week representing an increase of \$766.72 for each of them for the remainder of the period of operation or an aggregate of \$1,533.44.

26 (d) That in addition thereto said above named Deaner paid to himself out of petty cash receipts of the business during the term of its operation the amount of \$675.00 and the said Simmons above named out of petty cash receipts of the business paid to himself the additional sum of \$575.00, charging same to extra services rendered when in fact said extra services were not rendered to the executor.

(e) That said executor has improperly paid the sum of

\$90.00 during the month of January 1946 representing salary to an employee for services rendered two weeks subsequent to the date of the sale of said business.

(f) That this executor patronized the Occidental Hotel and Restaurant, consumed meals and liquors in said establishment, signed customer checks therefor aggregating \$202.83 which should have been chargeable to this executor personally and the additional sum for meals as above described in the sum of \$32.10 which should have been paid by the said executor personally. That said total sum of \$234.93 was not paid by the said executor but said amounts were charged off on the books of the company as follows:

To advertising \$32.10.

To unidentified allowance 202.83.

and said accounts were by this means charged off the books of the business.

(g) That the said executor improperly purchased from the going business under his operation on or about August 14, 1945 two cases of J. W. Dant Kentucky Bourbon sour mash whiskey and on another occasion secured and purchased from himself as executor four additional cases of liquors for which C. H. Doherty paid to himself as executor the sum of \$82.00 and \$200.00 respectively, which amounts were below the actual value of said whiskey and upon which the said business would have derived a considerable profit if the same had been sold at retail in the due course of business.

27 (h) In the early part of 1945 Breyer Ice Cream Company, a furnisher of supplies to the business, Occidental Hotel, paid to the business by way of refund the sum of \$667.87, all of which was the property of this estate but that this executor without right paid over to the estate of Fred W. Buchholz the sum of \$594.87 which estate was not entitled to any portion of said sum; that on

January 24, 1946 Breyer Ice Cream Company made a refund to the business being operated by this executor in the amount of \$600.37 which amount was not credited as receipts on the books of the company and no account therefor has been made.

(i) That at the time of Fred W. Buchholz' death on November 22, 1944 he was indebted unto Christina Buchholz, his mother, in the sum of \$5,000.00 for past due rent on the premises 1413 Pennsylvania Avenue, N. W., Washington, D. C., and that this executor has failed and neglected to collect the said sum of \$5,000.00 due this estate by the estate of Fred W. Buchholz.

(j) That this executor, after his first account, although he had large sums of cash in his possession, refused to make a distribution of any part thereof to your residuary legatees making it necessary legatees file proceedings against him to force a distribution of a portion of the net assets of said estate; that said executor has now on hand a large sum of money over and above anything that may be due by said estate and that he still neglects and refuses to file a final account or make further partial distribution of said balances to your exceptors who are entitled to said sums.

(k) That at the time that the executor of this estate assumed control of the going business and at the time the business was sold by the executor there were on the books of the business a large number of accounts receivable
28 representing monies due to the business by customers in and about Washington, D. C., and that except in one or two instances this executor has taken no steps to collect said accounts receivable as was his duty as a prudent administrator.

(1) At the time of decedent's death she was indebted unto Metropolitan National Bank of Washington on a note in the sum of \$25,000.00 borrowed for and credited to the

business, Occidental Hotel; that the executor reported the payment of said note in his first account; that your exceptors are advised by its auditors that it appears that said note was paid out of business receipts in the normal conduct of the business and that the same does not appear as having been paid out of the general assets in the hands of the executor. That under the circumstances the executor is not entitled to credit and allowance for the sum of \$25,166.67 allegedly paid in retirement of said note and interest, and should be required to account for same.

(m) That this executor secured authority to make improvements to the business premises and this Court made an order authorizing the expenditure of an amount not exceeding \$18,000.00. That the executor improperly and in violation of the Court Order expended unnecessarily for said alleged improvements a sum much in excess of \$18,000.00. That at the time said improvements were made said executor well knew that said business would be sold and that the improvements would inure to the benefit of the landlord who is also the principal beneficiary of the estate of Fred W. Buchholz, from which repairs this estate would derive no benefit or profit.

29 (n) Exceptors except to and oppose the allowance of \$35.00 to John McGinley as a witness fee for testifying against your exceptors on its exceptions to the first account and that if said sum is due it should be taxed as costs against the estate of Fred W. Buchholz in whose behalf the witness appeared.

5. The residuary legatees show further unto the Court that included in the total disbursements set forth in the second account of the executor and upon which he claims a ten per cent commission are certain movable assets of the estate which he has delivered to the residuary legatees and which are not disbursements upon which he is entitled to a commission.

WHEREFORE, exceptors pray that these exceptions to the second account of the executor be sustained, that said executor be made to account for the items not accounted for as herein set forth, and that the Court decree that the actions of the executor are such as to warrant disallowance of any commissions to him as executor or, in the alternative, that the Court allow said executor a commission in an amount considerably less than that claimed.

And for such further orders as may be just and proper in the premises.

PRENTICE E. EDRINGTON
HENRY I. QUINN

Attorneys for the residuary
legatees and exceptors.

* * * *

31 *Answer to Exceptions to Second Account of
Executor*

Comes now Cornelius H. Doherty, Executor of the Estate of Christina Buchholz, and for answer to the Exceptions filed by the residuary legatees to his second account, which includes a claim for partial commission as such Executor, and says:

1. That after the death of Christina Buchholz, the residuary legatees named herein, Mrs. Louise Stoner, Gustav Blank and Fred W. Merkle, the latter in proper person, for at that time he had not been adjudicated and confined to St. Elizabeth's, through counsel attempted to take over the operation of the Occidental Hotel and to oppose the taking over of the business by your Executor. The residuary legatees filed a petition for an injunction, a copy of which has never been served upon your Executor, and attempted to have the Court enter an order restraining your Executor from taking over the business of the Occi-

dental Hotel, which was a part of the assets of the Estate of Christina Buchholz, in accordance with his position as Executor named in the Will, under which the residuary legatees claim as residuary legatees. The only knowledge your Executor had of their attempt to obtain such an injunction was received from the Register of Wills, who advised your Executor that the matter was to be presented to Mr. Justice Letts at a certain time, and your Executor was present at the hearing and the complaint was dismissed. This was only one of the various and many incidents which the residuary legatees have caused from the time of the death of Christina Buchholz until the present time.

32 2. Answering paragraph 2 (a) of the exceptions, your Executor admits that he prepared the Last Will and Testament of Christina Buchholz and it was prepared at her request. Christina Buchholz knew at the time she executed her Will that your Executor was the co-executor of the Estate of her son, Frederick W. Buchholz, and had been aware of this fact prior to the death of Frederick W. Buchholz, for the question of both Wills were the subject of numerous discussions between Christina Buchholz and her son, Frederick W. Buchholz, who had died on the 22nd of November, 1944. There has been no conflict in interest which has in any way reflected on the action of your Executor in the execution of his position as Executor, both of the Estate of Christina and co-executor with the National Metropolitan Bank of Washington of the Estate of Frederick W. Buchholz, and the question concerning the Executor's fees were discussed with Christina Buchholz on a number of occasions prior to the actual execution of the Will.

3. Answering Paragraph 3 (i), your Executor doesn't understand what the residuary legatees mean when they state that he has failed to cooperate with the exceptors, for he has conscientiously endeavored to perform his duties

as the Executor of the Estate of Christina Buchholz and has at no time favored the Estate of Frederick W. Buchholz, and when any question has ever come up on the matter of the Estate of Frederick W. Buchholz, the matter has been scrupulously left to the co-executor, the National Metropolitan Bank of Washington, to make its own decision in the matter.

Specifically answering the statement that your Executor claimed the sum of \$36,196.64 as payable to the Estate of Frederick W. Buchholz from the Estate of Christina Buchholz, he says that soon after the death of Gustav Buchholz, the husband of Christina Buchholz and father of Frederick W. Buchholz, the business known as the Occidental Hotel and Restaurant, which had been left to Christina Buchholz, was turned over by her to Frederick W. Buchholz under a written agreement where-

33 by Christina Buchholz could at any time, upon sixty days notice, take back the business or upon the death of Frederick W. Buchholz prior to the death of Christina Buchholz, that the business would revert to Christina Buchholz.

During the years following from 1926, the Occidental Hotel and Restaurant had its own auditor regularly employed and the accounts of the Occidental Hotel and Restaurant and the private accounts of both Christina Buchholz and Frederick W. Buchholz were audited and maintained by the firm of McGinley and McGinley, certified public accountants, and during this period of time to the death of Frederick W. Buchholz he retained the entire net profits of the business of the Occidental Hotel and Restaurant. A private set of books was kept for Frederick W. Buchholz and one for the Occidental Hotel.

After the death of Frederick W. Buchholz, McGinley and McGinley continued to audit the books of both Christina Buchholz and the Occidental Hotel and Restaurant until the time of her death, and it was during the period

of time between the death of Frederick W. Buchholz and the death of Christina Buchholz that there was presented to her the fact that she owed the Estate of Frederick W. Buchholz approximately \$50,000.00, the exact figure of which would not be available until a final audit had been made by McGinley and McGinley, and Christina Buchholz told your Executor at that time to arrange for the payment of whatever might be due the Estate of Frederick W. Buchholz by virtue of the audit of McGinley and McGinley. The final audit was not completed until after the death of Christina Buchholz, and your Executor honestly and conscientiously believing that it was a proper charge against the Estate of Christina Buchholz carried it as such, and the exception filed by the residuary legatees to this was granted by the Court, but the matter is now on appeal.

34 The item covering the funeral expenses, in the sum of \$2,863.00, was on a bill which was directly billed to Christina Buchholz after the death of her son and which she authorized the payment of prior to her death, and the exception to this was also granted. Answering the statement concerning the defending of the suit of the Executors of Frederick W. Buchholz covering its claim for the sum of \$36,196.64, contained in paragraph 3 (i), your Executor states that this is a definite misstatement of fact and that only the National Metropolitan Bank of Washington filed the suit on behalf of the Estate of Frederick W. Buchholz, and the exceptors were not required to defend this suit, but their counsel had definitely written to your Executor stating that they desired to intervene in any suit which was filed on this matter and to protect the interests of the residuary legatees, and in a telephone conversation with Mr. Edrington I stated that I would be glad to have him defend any suit against me as the Executor under those circumstances, provided that no charge would be made against the estate for his services, which he said was very agreeable to him, and when the suit was filed it was immediately forwarded to Mr. Edring-

ton by letter of May 10th, which confirmed our previous conversation, and it is true that in the case judgment was entered on the pleadings against the National Metropolitan Bank of Washington, but this case is presently on appeal.

A suit was filed by Gawler's Sons, Inc. for the sum of \$2,863.00 and the residuary legatees did not defend either the suit against the Estate of Frederick W. Buchholz or the Estate of Christina Buchholz, which is also a further definite mis-statement of fact.

Answering paragraph 3 (ii) your Executor denies that the Estate of Christina Buchholz was legally entitled to a certain lease upon the premises 1411 Pennsylvania Avenue, N. W., and did refuse to include this lease as an asset of the Estate of Christina Buchholz. In his statement of refusal, both by letter and an answer to the suit filed
35 by the residuary legatees, your Executor stated that primarily the lease was a liability and would be only an asset when taken in cooperation with the operation of the Occidental Restaurant and that it was impossible to obtain any long term lease on the Restaurant proper and that under the circumstances the Estate would be damaged by any endeavor to obtain such a lease. In fact, the Estate of Frederick W. Buchholz would appreciate being relieved of the liability which attached to the Estate of Frederick W. Buchholz by reason of the contents of the lease which made the payment of the rent for a period of approximately seven years as a charge against the Estate of Frederick W. Buchholz, and the records in the Probate Court, in the Estate of Frederick W. Buchholz, indicates clearly that the lessors did not release the Estate of Frederick W. Buchholz of its liability under the lease. The operation of 1411 Pennsylvania Avenue, N. W. in and of itself at all times indicated a loss and its operation was made possible only to the extent that it was an aid to the operation of the Restaurant. Your Executor knows nothing about the employment of counsel in this matter for the

residuary legatees have had counsel in this matter from shortly after the death of Christina Buchholz.

4. Answering paragraph 3 (iii) covering the claim of \$119,000.00 due from the Estate of Frederick W. Buchholz, your Executor states now, and has definitely stated in the past, that the Estate of Christina Buchholz does not have a vestige of a claim against the Estate of Frederick W. Buchholz growing out of this claim, and believes that it was claimed by the residuary legatees merely for a bargaining wedge in an endeavor to obtain a lease from the owner of the real estate on which the Occidental Restaurant is situated.

5. Answering paragraph 3 (iv) your Executor admits that he has converted the real estate into cash in accordance with the discretion given to him in the Will of Christina Buchholz, and believes that his action in this matter was to the best interest of the Estate.

36 6. Answering paragraph 4 of the exceptions your Executor denies that he has failed to collect any sums due the Estate which were collectable, and denies that he has paid out monies unlawfully in the conduct of the business as set out therein and will specifically answer each paragraph contained in paragraph 4.

Answering paragraph (a), it is true that an error exists in the original account but no addition was made by your Executor in the original account filed, a copy of which was forwarded to Mr. Edrington, one of the attorneys for the residuary legatees at the time it was filed, and a computation was subsequently made by an employee of the Register of Wills, and the error in this computation can very well be remedied in making up the computation of this account.

Answering paragraph (b) your Executor denies that he has failed to charge himself with the profits of the operation of the Occidental Hotel and Restaurant for the

period from January 15th to January 31st, 1945 as alleged, but that this sum was taken and considered as a part of the assets of the Hotel at the time he took over on February 1, 1945.

Answering paragraph (c) your Executor admits that he raised the salaries of Charles Simmons and Raymond Deaner making them co-managers of the Occidental Hotel and Restaurant and believes that the salary so paid was justly due the employees and was more in accordance with the salaries paid to employees in like positions in the District of Columbia. It must be remembered that no salary was requested by your Executor for his services during the operation of this business, and that considerable time was necessarily spent at the Hotel during the period it was operated by the Estate.

Answering paragraph (d) it is admitted that a certain part of the additional salary paid to Deaner and Simmons was taken out of the petty cash, but that was subsequently refunded and is apparent in the records audited by McGinley and McGinley.

37 Answering paragraph (e) your Executor admits the payment of \$90.00 that one of the employees was paid for two weeks after the business was sold in order to bring the records of the business up-to-date and was a proper charge against the business.

Answering paragraph (f) your Executor admits that certain charges were made for food and occasional drink and states that your Executor was at the Occidental Hotel and Restaurant approximately five hundred and fifty times for periods ranging from one hour to six hours in supervising the business, and all the employees of the business were entitled to their meals and it was only when your Executor was actually there and engaged in the operation of his duties did he sign checks for his meals, the same as any other employee. Gustav Blank, one of the residuary

legatees, was employed during this entire period of time and received his meals and certain allowances of liquor.

Answering paragraph (g) your Executor admits the purchase of certain cases of liquor from the Hotel and states that the amount paid was the actual wholesale value in effect at the time that the purchase was made, and on each occasion the steward called the wholesale merchant to ascertain the actual cost which was immediately paid by your Executor. Your Executor states that he had over a period of years, both with Frederick W. Buchholz and Christina Buchholz, done the same thing.

Answering paragraph (h) concerning the refund from Breyer Ice Cream Company, your Executor states that the statements contained therein are definite mis-statements of fact and that these refunds were properly credited.

Answering paragraph (i) your Executor states that the rent was properly adjusted as of the date of the death of Frederick W. Buchholz and it was so accepted by Christina Buchholz.

Answering paragraph (j) your Executor states that the residuary legatees were required to file a petition for partial distribution and for an order requiring such
38 partial distribution and this is in accord with the proper practice of the Probate Court.

Answering paragraph (k) your Executor states that the matter contained therein is a definite mis-statement of facts and that all collections have been made and are being made.

Answering paragraph (l) your Executor states that the matter of the note for \$25,000.00 was paid after the death of Christina Buchholz and out of funds which were not then available to the business or the Estate of Christina Buchholz and if exceptors' auditors have properly checked the records they will find that this is so and has been accounted for.

Answering paragraph (m) your Executor states that normal improvements which were required were made at all times without asking for approval by the Court and they were matters which were necessary in order to continue the business. The amount of \$18,000.00 authorized by the Court merely covered substantial matters which had to be done if the business were to be continued and were required by the District of Columbia.

Further answering paragraph (m), it is stated that the improvements were made when the Executor knew that the business would be sold and that the improvements would inure to the benefit of the landlord. Mr. Edrington, counsel for the residuary legatees, at all times informed your Executor that they were going to obtain a lease of the business and in a letter under date of January 10, 1946 addressed to your Executor by Mr. Edrington, who styled himself "Attorney for Mrs. Louise Stoner, Gustave Blank and Fred W. Merkle", he stated that he authorized the continuance of the business of the Occidental Hotel and Restaurant during the period beginning January 16, 1946 and ending January 31st, 1946. It was further stated in the letter the following:

"We trust that under this arrangement you will be facilitated in closing your books as operating Executor as of the close of business on January 15, 1946, and that in the interim prior to the end of the month of January we can make all arrangements for assuming control of the business on February 1, 1946."

39 The foregoing statement definitely indicates that the residuary legatees intended to go into possession of the business and had not been averse to any necessary improvements.

In June of 1946, Mr. Edrington, as attorney for the residuary legatees, requested permission of your Executor for the firm of Frazer and Torbet, Certified Public Ac-

countants, to make a complete audit of my conduct of the business of the Occidental Hotel and your Executor informed Mr. Edrington that he would be glad to permit such an audit and make all the books and records available to this accountant provided that a copy of this audit was given to your Executor immediately upon its being made and that under no circumstances would he consent to an audit without the assurance of receiving a copy of the audit. Mr. Edrington consented to giving a copy of the audit to your Executor, and records, which had been filed away at the home of your Executor in Virginia, were returned to the Hotel and all records including bank statements and so forth, were turned over for their inspection.

On November 6th, 1946, when your Executor forwarded a copy of his second account to Mr. Edrington, he requested the return of certain records together with a copy of the account of the auditors, and in a letter dated November 8th, 1946, Mr. Edrington responded as follows:

"I regret that I have been unable to return to you the documents from your files which you loaned me some-time ago. I am, however, having them photostated today and will return them to you early next week.

With reference to the audit which the residuary legatees have had made of the conduct of the business by you as executor, I do not have in my possession a copy of this audit as the report of the auditors was delivered to their clients, the residuary legatees. I have discussed with them the propriety of delivering to you at this time a copy of this audit, and they are opposed to giving me a copy of the audit for transmission to you. They feel that it will be time enough to make a disclosure of the audit upon the hearing of their opposition to your account.

40 Their position in the matter is that you have made no effort to cooperate with them and to make avail-

able to them your books of accounts and records and that they are not called upon, under the circumstances, to give you any information from an audit which has cost them considerable amount of money.”

Your Executor knows that all the negotiation with the auditors were made by Mr. Edrington and that he was in a position to furnish a copy of this audit in accordance with his promise and it is necessarily apparent to the Court that such a copy could very readily be obtained by Mr. Edrington.

Answering paragraph (n) it was necessary to have the testimony of John McGinley, the Certified Public Accountant, who audited the books of both Frederick W. Buchholz and Christina Buchholz and the Occidental Hotel in Court to testify at the hearing on the exceptions on the first account and his charge for those services is proper.

7. The residuary legatees object to the terms of the Will that the Executor be allowed the maximum compensation permitted by law, which is ten per cent, but they accept everything that they are given under the Will itself and if the Will was valid and proper so far as the devise to the residuary legatees, then the part given to your Executor, the maximum compensation is also a valid part of the Will.

The case of Washington Loan and Trust Company v. Convention of Protestant Episcopal Church of the Diocese of Washington et al, 54 App. D. C., 14, the Court at page 18 made the following statement:

The executorship in the case before us was tendered to the trust company upon certain conditions. It accepted the executorship but expressed the opinion that the conditions were illegal. This was not equivalent to a refusal to be bound by the conditions. It rather disclosed a disposition to retain the executorship while reserving the right to assail the conditions. This was not permissible.

It could not take the benefit and reject the burden. They were inseparable. A situation somewhat analogous to this was presented in *Utermehle v. Norment*, 197 U. S. 40, 57, 25 Sup. Ct. 291, 49 L. Ed. 655, 3 Ann. Cas. 520, 41 where it was held that a party taking the benefit of a provision in his favor under a will has really no foundation to dispute the proposition that he is thereby precluded from at the same time attacking the validity of the very instrument under which he received the benefit. The court cites several state cases in support of this view. One of those cases, *Fry v. Morrison*, 159 Ill. 244, 42 N. E. 774, held that one who took a beneficial interest under a will was thereby estopped to set up any right or claim of his own, though otherwise well founded, which would bar or defeat the effect of any part of the will. Here the trust company accepted a beneficial interest under the will and now seeks to defeat the effect of that part of the document which limits the amount of its compensation. This may not be done. We think it must be held that in accepting the executorship the trust company consented to be bound by the provisions limiting its fees.

And again the Court at page 19 made the following statement:

Moreover, it is manifest what the intention of the testator was. If his intention does not conflict with any rule of law or public policy, and we have seen that it does not, it is the court's duty to be diligent in seeing that it is obeyed. Nice distinctions by which the clearly stated will of a testator would be defeated should not be resorted to or encouraged.

It is apparent that it was the intention of the testatrix that your Executor receive the full ten per cent, and it is respectfully submitted that the other exceptions have been fully answered and that all the exceptions to the account should be denied.

CORNELIUS H. DOHERTY
Cornelius H. Doherty

1010 Vermont Avenue, N. W.
Washington, D. C.

DISTRICT OF COLUMBIA, SS:

Cornelius H. Doherty, being first duly sworn on oath deposes and says that he has read the answers to the exceptions filed herein and the facts contained in the said answer are true.

CORNELIUS H. DOHERTY

Subscribed and sworn to before me this 26th day of November, 1946.

ANTHONY J. SICILIANO
Notary Public, D. C.

My Commission Expires June 14, 1951.

* * * *

43 Restated Second Account of Cornelius H. Doherty,
Executor.

Letters Issued February 1, 1945.

	Assets Received	Disburse- ments
This executor charges himself with the following assets received:		
Cash on hand as shown by 1st account	165,618.32	
Proceeds of sale of 1941 truck appraised at \$470. sold for.....	535.00	
Proceeds of sale of 200 shares Packard Motor Car Company appraised at \$1200. sold for.....	2,452.43	
Proceeds of sale of 100 shares Packard Motor Car Company carried at \$600. sold for	1,226.34	

Proceeds of sale of 100 shares Pacific Western Oil Corp. ap- praised at \$2,000. sold for	2,775.59
First Trust Note sec. by part Lot A Square 247 (Dilli) paid in full Sept. 10/46	10,000.00
Interest on said note March 23, 1946	200.00
Interest on said note Sept. 10, 1946	200.00
September rent not reported in 1st account received from prem- ises located on Lots 18, 26 and 27 Square 5643	263.87
Proceeds of sale of Lot 43, Square 1087 205 - 17th St. S. E.	3,412.53
Cash withdrawn from National Savings and Trust Company	46.69
Adjustment of insurance on real estate	23.76
Refund of taxes paid prior to death	302.10
U. S. Treasury Bond	3,710.00
Commission Breyer Ice Cream Company	600.37
Interest—U. S. Treasury Bonds....	492.05
Interest Savings Acct. Riggs Natl. Bank	2.29

Amounts carried forward, \$191,861.34

44 Brought forward, 191,861.34

Rent—Lots 18, 26, 27, Square 5643	16.81
Dividends National City Bank of New York	50.00
Reynolds Tobacco "B", dividends	210.00
Briggs and Stratton, adjustment	.51

Miscellaneous Receipts	4.72	
Refund of Premium, Insurance of Christina Buchholz	98.38	
Refund of Insurance, Lots 18, 26, 27, Square 5643	36.75	
This executor claims credit and al- lowance for the following disburse- ments:		
To Abram F. Myers, guardian ad litem fee under order of Court		250.00
Howard and Hoffman, bond pre- mium		360.00
Francis Attig, transcript		25.00
Collector of Taxes, D. C.		53.68
Collector of Internal Revenue, in- come tax		8,727.46
Collector of Taxes, D. C. income tax		229.41
Collector of Internal Revenue, es- tate tax		44,610.40
John McGinley, testimony		35.00
H. Gabriel Murphy, additional in- surance due on real estate		32.54
John McGinley, auditing records		360.00
Costs on Appeal		5.00
Register of Wills, costs		8.04
Clerk, Court of Appeals		35.00
Register of Wills, costs.....		135.60
Collector of Taxes, D. C. inheri- tance tax		12,036.79
Wilson-Epes printing Company ..		126.80
Capital City Monumental Works		175.00
Settlement of claim of District Trucking Company		72.50
Amounts carried forward, \$192,278.51		67,278.22
45 Brought forward, 192,278.51		67,278.22

County Treasurer, Upper Marlboro, Md. taxes		29.44
Withdrawal of cash from National Metropolitan Bank for deposit to credit of business of Occidental Hotel, Feb. 8, 1945 at Riggs National Bank		19,053.06
The following partial distribution under order of Court:		
Louise Stoner		30,000.00
Gustav Blank		30,000.00
Wilhelmine Merkle, Committee for Frederick William Merkle, Mental Health No. 29,571		30,000.00
Proceeds of sale of business under order of Court of January 25, 1946	\$77,506.13	
Stock and fixtures appraised at \$63,309.40		
Forwarded from 1st account	18,309.71	
Profit for November 1945	3,471.36	
Loss for December 1945		5,718.42
Profit for January 1946	5,200.22	
Cash received from operation of business from date of death to Feb. 1, 1945	1,313.96	
Additional expenses for purchase of equipment and improvements.. (Cash on deposit to credit of estate from operation of business \$18,041.14)		4,535.69
Commission of 10% as follows:		33,749.26
Disbursements 1st acct.	\$104,777.72	
Less Refunds & Adjustments	1,280.32	
		\$103,497.40

Plus distribution 1st a/c	57,634.55
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\$161,131.95

Plus distribution 2d a/c	90,000.00
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\$251,131.95

Partial disbursements 2d a/c	86,360.72
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\$337,492.67

The Will of decedent states that the executor "be allowed the maximum compensation permitted by law."

Balance on hand	77,715.80
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Report Under Rule 49.

Amounts carried forward, \$298,079.89	\$298,079.89
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* * * *

48 *Supplemental Exceptions to Executor's
Second Account, and Exception to
Restated Second Account*

Now comes Mrs. Louise Stoner, Gustav F. Blank and Fred W. Merkle, by his Committee, Mrs. Wilhelmina Merkle, the residuary legatees named in the last will and testament of the above decedent, hereby reiterating all exceptions heretofore filed to the second account of the Executor, do except further to said second account and restated second account and show to the Court:

1. That this Executor opened and maintained in the Riggs National Bank, Washington, D. C., two separate accounts, namely, one in the name of the Estate of Christina Buchholz, Cornelius H. Doherty, Executor, hereinafter referred to as "Executor's Account" and another in the

name of Occidental Hotel, Cornelius H. Doherty, Executor, hereinafter referred to as "Business Account".

49 2. This executor has sold all of the assets belonging to the estate and has deposited most of the receipts therefor, in his Executor Account, with the exception that this Executor sold U. S. Treasury Bonds belonging to this estate and received therefor a total of \$10,102.50, that is \$10,000 principal and \$102.50 interest, which amount so realized he did not deposit to either his executor or business account, but retained and used the same for his personal advantage without your exceptors knowledge or consent, and for which amount he has not, in any of his accounts, shown the same for allowance as a disbursement.

3. That save and except for the \$10,102.50 representing the proceeds of the sale of said U. S. Treasury bonds, the cash received and deposited to his Executor account indicates that he has received

In the year 1945	\$167,241.83
In the year 1946 to Jany. 31, 1947	151,267.42
Total deposited in Executor Account	318,509.25

and had said Executor deposited to his Executor Account the proceeds of the sale of the U. S. Bonds on which he realized \$10,102.50 as aforesaid, his total receipts would, therefore, have been the sum of \$328,611.75 in said account.

4. That all actual total disbursements from said Executor Account as will show by checks drawn against the same up to January 31, 1947, aggregate the sum of \$237,109.09. Included, however, in said total disbursements are the respective sums of \$4,000, \$1,000.00 and \$5,000.00, being amounts represented by checks drawn to the order of Cornelius H. Doherty, which amounts totaling \$10,000.00 the said Executor has taken and paid unto himself on account of ultimate alleged commissions claimed to be due to him as Executor. That said payments were so made without your exceptors knowledge and consent

and without statement thereof in any of his accounts. The said \$10,000.00 reduces the actual disbursements of this Executor to the sum of \$227,109.09 as of the
50 date of his restated second account.

5. That the Executor in stating his accounts has so prepared them as to show disbursements which in fact he did not make, said excess disbursements being so placed in his accounts to inflate the same and improperly represent the funds disbursed by him and the alleged services he has rendered. That his claim to commissions is based upon these inflated disbursements.

6. That in addition to the balance of \$101,502.66 which the said Executor should have on hand in his Executor account, and which he does not have but is short \$20,102.50, said Executor has on hand in his Business Account the sum of \$10,040.20 which amount he has not reported in any of his accounts as filed. Accordingly, this Executor should have on hand

Balance in Executor Account	\$101,502.66
Balance in Business Account	10,040.20
	111,542.86

which sum he does not have on hand.

For further exception to this Executor's second and restated second account, your exceptors show:

7. That this Executor reported in his accounts as having received from the Metropolitan National Bank the sum of \$44,219.73 and to have disbursed therefrom in payment of a note made by decedent and due the said bank in the principal sum of \$25,000.00 with interest, \$25,166.67, whereas in fact said bank prior to the qualification of this Executor had paid unto itself the amount due on said note and thereafter delivered to the Executor the balance, to-wit: \$19,053.06 which was the sum actually received by this Executor; that the statement of the account in this

manner resulted in the claim by the Executor for commissions on \$25,166.67 which he did not make and on which no commissions can be claim or should be allowed.

8. That in his restated second account, this Executor has not shown or accounted for (a) Prepaid Insurance, \$2,597.65; (b) Petty Cash, \$3,100.00; (c) Collections of Accounts Receivable, \$2,121.37, totaling \$7,819.02, which sum was paid to him by the purchaser of the Estate business and by him deposited to his Executor account on May 3, 1946; nor has he stated or accounted for the rents of \$1,000.00 per month for the months of July, August, September, October and November, 1944, past due and owing by Fred W. Buchholz to his mother, the deceased herein, a total of \$5,000.00; nor has he accounted for the balance of accounts receivable in the sum of \$1,135.46 or for the accounts receivable written off as alleged bad debts involving \$1,706.42; nor has he stated or accounted for improper salary increases improperly and without authority were taken out of petty cash by his employees Deaner and Simmons totaling \$1,250.00 and improper salary increases aggregating \$1,533.44 paid to said Deaner and Simmons; that he has failed to account for \$234.93 representing sums due by this Executor to the Estate business, and improperly charged off to advertising and to allowances.

9. That an audit caused to be made by your exceptors shows that the profit made in the operation of the business by this Executor was \$23,072.65, whereas this Executor has incorrectly reported said profits as \$18,041.14 or a difference of \$5,031.51 for which sum the Executor should be made to account. That in his restated account this Executor has not only restated the profits of the business as above shown, but claims credit on p. 3 of the restated second account for the sum of \$4,535.69 allegedly disbursed for purchase of equipment and improvements, whereas all expense incurred for such items were in fact paid and

settled out of business gross income. That exceptors believe that said item of credit, \$4,535.69 is a duplication and should be disallowed.

Wherefore, exceptors pray that upon due hearing these exceptions and those heretofore filed to the second account of the Executor be sustained; that said Executor be
 52 made to account for the items set forth herein; that by reason of the actions of said Executor it be decreed that he has forfeited any right to commissions, and for such further orders as may be just and proper in the premises.

PRENTICE E. EDRINGTON
 Prentice E. Edrington
 Attorney for Exceptors
 438 Munsey Building
 Washington 4, D. C.

* * * *

53 This is a matter of exceptions brought by the residuary legatees of the Estate of Christina Buchholz, to the second account of the executor, Cornelius H. Doherty.

The main exception is directed towards the commission of ten percent. on total disbursements on account of which respondent has already advanced himself the sum of \$20,122.50. There are other items also, to which the residuary legatees except but since this is the main one it will be disposed of first.

It may be noted at the outset that apparently the relationship between that of the decedent and the respondent was more than a mere professional one—as was that existing between Fred Buchholz, the son of Christina, of whose Will respondent was a co-executor.

In her Will, the decedent (Item 16) provided,
 54 “. . . and that he (executor) be allowed the maxi-

imum compensation permitted by law'', which, under our statute, is 10%. The exceptants say the executor is not entitled to such commissions for three reasons:

- 1.) Because of the conflicting interests between the estates of mother and son;
- 2.) The Will provision referred to is not binding on the Court; and
- 3.) The actual amount the executor is alleged to have disbursed is not correct.

There is no doubt that the progress of the administration of the estates of both mother and son resulted in a clash of conflicting interests and it is to be noted, also, that apparently the beneficiaries of the former—exceptants here—and the beneficiary of the latter—his daughter—are apparently not friendly. It may very well be that the respondent, knowing of this possibility, if he did, should have declined to act in the dual capacity in which he subsequently found himself. On the other hand, apparently mother and son saw nothing of a monitory character in the arrangement, nor is it to be expected that the executor could envision what did happen—the practically contemporaneous passing of both mother and son.

True, he had prepared the last Will of Mrs. Buchholz and knew he had been named as co-executor of her son's estate; but Mrs. Buchholz knew it and knew it apparently to be a fact for quite a few years before. (R. 12/11/46. p. 11).

It would seem, however, that the respondent, by virtue of his knowledge of the business arrangements between the mother and the son, and the apparent unfriendliness between her legatees and the beneficiary of the son, might have exercised a very wise professional discretion and refused to serve either as executor of the mother's estate

or as co-executor of the son's estate, under the circumstances. This he did not do.

55 Yet in the absence of malfeasance or misfeasance,—and neither is here charged—and having in mind the fact that so far as the son's estate is concerned, he was acting jointly with a corporate co-executor, there is no controlling objection in either of the first two reasons advanced for denial of the commissions.

The third, however; namely, that the amount claimed to have been disbursed is not correct, is important. It is well to note and, as observed above, the exceptants frankly state they are raising no question of the respondent's personal integrity but take the position that certain items charged as such are not proper and, therefore, his disbursements and, as a consequence, his commissions should be less than those claimed. These will be dealt with *seriatim*.

1.) A credit of \$25,166.67 claimed as paid to the National Metropolitan Bank in liquidation of a \$25,000 obligation plus the difference in interest, represented by a note executed by decedent in its behalf cannot be claimed as a disbursement by the respondent. By his own testimony (R. 12/11/46, p. 56) he states this obligation was liquidated by appropriation by the bank itself from the deposit of the decedent, so that in charging himself with what was on deposit and taking credit for what had been appropriated by the bank in liquidation of the obligation referred to above, the respondent is in error. This item is disallowed.

2.) The charge as commission on the \$20,000 trust encumbrance on the real estate is improper. The commission of an executor in such a transaction is limited to the actual net receipt. It would be different if he actually received the whole price and by his own check paid off the encumbrance. (See *Farmers Loan and Trust Com-*

pany v. Turner, 1926, 151 N. E. 439, 440; 242 N. Y. S. 240). This item is disallowed.

56 3.) The item of \$67.80 which represented a discount on the decedent's funeral expenses would have been secured to the estate if respondent had paid the bill on time. This he did not do and is to be charged therefor, for his neglect.

4.) The attempted charge of the son's funeral expenses to the estate of the mother is completely mystifying and under the circumstances respondent should be charged with the expenses and cost of litigation made necessary in order to prevent this item from being made a charge against the estate of the decedent.

5.) The item of \$4435.69 for additional expense for purchase of equipment, et al., in relation to the business and disbursements which the respondent now says is made up of \$3400 for such expenses plus \$1135 for bad debts is challenged, the exceptants claiming there is a duplication here. This and similar related items of a minor character are referred to the Auditor of this Court. As to what this amount actually represents, the testimony with respect thereto is obscure and confused. (R. 11/11/46).

With reference to the allowance of 10% commission it may be observed:

First of all, this amount is within the statutory limits fixed by the law (D. C. Code, 1940 Ed., Sec. 20-605, 610) and in addition to that the decedent in her Will specifically requested and directed that the respondent be permitted to charge this percentage for commission. However, a more important question is raised by his action, without antecedent approval of the Court, in appropriating to himself in payment a substantial advance—\$20,122.50. The rule in this jurisdiction has always been to the effect that commissions are *only available* when the administration is closed and a final settlement approved and this for the

very cogent reason that only at that time has the Court before it complete evidence of the amount and character of the services performed upon which it may intelligently base an allowance and therefore that as a consequence an executor is not entitled to an allowance of commissions *prior* to final settlement. (*Brosnan v. Fox*, 1922, 52 App. D. C. 143). And this is still the law. The Court of Appeals stated in *Haloney v. Foundry Methodist Episcopal Church*, 78 U. S. App. D. C. 263, that it saw no reason to depart from this basic principle as it found it to be a rule of safety and caution to be observed in the payment of executors. The Court further alluded to the fact that it was not a statutory rule, however, and therefore should not be applied in such a manner as to create an unnecessary burden and then went on further to say:

"If, *after hearing evidence*, the court finds (1) unavoidable delay in final settlement will cause an unreasonable hardship on the executor if payment of his commission is postponed, and (2) that there is no reasonable probability that the remaining amount available for executor's commissions will be insufficient to satisfy the claims of a possible successor, it should be *within the discretion of the court* to allow the advance payment of an executor's commission." (Underlineation supplied).

The Court seems to indicate in the opinion quoted, and I so hold, that while advance payments may be allowed, *a hearing by the Court* is an antecedent requirement and the sections of the statute above referred to indicate also this important condition precedent. Section 605 states "... his commissions which shall be at the discretion of the court ..." indicating court appraisal; while Sec. 610 provides "... shall be entitled to retain out of the money such commission *as the court shall allow* ..." again indicating the same necessity.

As a consequence, I conclude that the executor had no authority to advance himself anything in the nature of commissions without an antecedent hearing before the Court and it is difficult to understand, under the circumstances, how he could possibly conclude that either the statute or the rulings made under it by our Court
 58 of last resort gave him any warrant to do any such thing. His contention, that since the Will allowed him the maximum compensation permitted him by law, such compensation is in the form of a gift and that it may be retained by virtue of such character, is untenable. The case of *Washington Loan and Trust Company v. Convention of Protestant Episcopal Church, Diocese of Washington, et al.*, 54 App. D. C. 14, cited by the respondent as supporting his position, has no bearing on the point whatsoever. And with reference to advances generally and the necessity for an antecedent hearing, presumably the view of this Court as to the necessity for such is exemplified by its previous practice. (See: *In Re Estate of Isobel H. Lenman*, Adm. No. 41,501 and *In Re Estate of Mary Perry Brown*, Adm. No. 40,610).

It would be futile under the circumstances, however, now that the Court has heard the matter, to remand the same for a further hearing. I conclude, therefore, under the circumstances that the respondent is to return to the estate an amount representing 6% interest on the monies advanced to himself without Court authority, said interest to run from the date of said advance to the date of this opinion.

Further with reference to other matters in litigation, such as the lease, the \$36,000 item, so-called, and the Virginia property, presumably, in the absence of a showing to the contrary, there appears to be a bona fide dispute between the two estates and, under the circumstances, I do not conclude that the respondent is in any way responsible for any or all of these situations.

Yet it would appear that despite the expressed desire of both decedents that he act as their executor, it would seem that the first manifestation of a serious clash of interests should have led him to conclude that not only professionally was his position anomalous but one that would certainly lend itself to criticism.

59 Presumably, however, he concluded that there would be no clash of major proportions except perhaps the usual show of pique that beneficiaries in situations of this kind sometimes manifest towards each other. Be that as it may, mankind simply does not admit of the perfection that an individual would have to possess, under the circumstances, and it may be observed in conclusion that by far the better thing to do for persons confronted with such a situation would be not to attempt to walk on both sides of the street at the same time.

MATTHEW F. MCGUIRE
Associate Justice

July 1, 1947

* * * *

70

Order

The motion for a new trial or rehearing filed herein by Cornelius H. Doherty, Executor of the Estate of Christina Buchholz, having been over ruled by entry of order herein on September 17, 1947, and for the reasons set forth in memorandum opinion dated July 1, 1947, it is by the Court, this 22nd day of September, 1947,

Ordered, decreed and adjudged that the exceptions filed to the second and restated second accounts of Cornelius H. Doherty, Executor of the Estate of Christina Buchholz, deceased be and the same are hereby sustained to the extent that

1. The commissions allowable to the executor as stated in the last will of Christina Buchholz are hereby fixed at

ten (10%) per centum;

71 2. The commissions of 10% allowable to the executor are restricted to the actual net cash received by the said executor and disbursed by him;

3. The credit claimed for \$25,166.67 claimed to have been paid to the National Metropolitan Bank of Washington, in liquidation of a note for \$25,000.00 and interest, is disallowed and no commissions are payable to said executor on said sums;

4. The Executor is to pay to this estate, out of the commissions to which he is otherwise entitled, interest at the rate of six (6%) percent on \$20,122.50 representing partial commissions which the Executor advanced to himself without order of Court, said interest to be calculated from the respective dates of said advances to July 1, 1947.

MATTHEW F. MCGUIRE
Justice.

September 22, 1947

Seen:

CORNELIUS H. DOHERTY
Executor, Estate of
Christina Buchholz.

* * * *

176 *Statement of Points*

The following is a concise statement of the points upon which the appellant will rely in the Court of Appeals:

1. The Court erred in holding that the Executor was not entitled to claim commissions on the inventory of the estate whether disbursed by his agent or himself.

2. The Court erred in holding that the amount of money in the bank at the decedent's death was not a part of the inventory of the decedent's estate and that the Executor was not entitled to commissions on any payments from that fund.

3. The Court was in error in holding that it was necessary for the Executor to obtain an order of Court in order to make partial advances of commissions to himself and in charging the Executor six per cent interest on the amounts advanced.

CORNELIUS H. DOHERTY
Cornelius H. Doherty

1010 Vermont Avenue, N. W.
Washington, D. C.

I certify that a copy of the foregoing Statement of Points was mailed to Prentice E. Edrington, Esquire, Munsey Building, on the 16th day of October, 1947.

CORNELIUS H. DOHERTY
Cornelius H. Doherty

* * * *

73 Wednesday, December 11, 1946.

* * * *

76 Thereupon

Cornelius H. Doherty,

* * * *

Examination

By Mr. Edrington:

79 Q. Mrs. Buchholz owned how many pieces of real estate situated in the District of Columbia? A. She owned the property out on Fourteenth Street, a Sanitary, and there is a piece of unimproved property on
80 H Street, between Fifteenth and Sixteenth—Fifteenth and Vermont Avenue—no, between Seventeenth and Eighteenth, and a small piece down in Southeast Washington, and a couple of small apartments, and property on Rhode Island Avenue.

Q. That was the filling station on Rhode Island Avenue?
A. That is right.

Q. Those were all commercial properties, weren't they, in the sense that they were all rented? A. Yes. One was unimproved.

Q. Now, you sold all those properties under the authority given you under the will, did you not? A. I did. At a very good price.

Q. You had discretion, of course, under the will. You could have refrained from selling them if you had desired? A. I could have if I had wanted to.

Q. Did you ever consult the residuary legatees about those properties and tell them you had an offer for them? A. No. They were published and they all went through the Court.

Q. You never once called them up or wrote to them and said that you had an offer for the sale of those properties, and you never afforded them an opportunity to buy those properties themselves, or to take them as part of their legacy in this case, did you? A. No. I did not
81 know what the legacies would be, whether it would be anything coming to them.

Q. You did not know? A. No.

Q. As a matter of fact, as your accounts show, wasn't there enough cash in this estate without even having to sell any of those properties? A. No, indeed. Most of my money came from that.

Q. Well, now, doesn't your account show? Haven't you actually paid them in this case—— A. The account speaks for itself, Mr. Edrington.

Q. I ask you the question: Hadn't you actually paid them \$90,000 in one instance and \$30,000 in another, which is \$120,000? A. That is right.

Q. And haven't you still got almost \$100,000 in hand, or more than \$100,000 in hand? A. A little more than \$100,000. That is correct.

Q. How much more? A. I think it runs about \$107,000 or \$108,000. Of course, there are a lot of claims pending against that.

Q. A lot of claims pending against that? A. Yes.

Q. Now, didn't, in the course of your administration—
strike that.

What claims are pending against this sum of
82 \$107,000 that you say you have on hand?

The Court. Just a minute. May I suggest that
we keep within the limits of the exceptions?

Mr. Edrington. Well, if your Honor please, we have
an allegation in those exceptions that he has not acted as
a prudent administrator; that he has treated these residu-
ary legatees as if they were outsiders.

The Court. Now, may I merely make a suggestion?

Mr. Edrington. Yes, sir.

The Court. You have prepared in proper form certain
exceptions, so I suggest we follow them per seriatim.

Mr. Edrington. All right, sir.

The Court. That is, take them up one at a time.

Mr. Edrington. All right, sir.

The Court. First of all, there is an objection to the
10 percent commission.

Mr. Edrington. Yes, sir.

The Court. Why?

Mr. Edrington. Because of all the things that followed,
if your Honor please, later.

The Court. All right; proceed.

Mr. Edrington. Yes, sir.

By Mr. Edrington:

Q. Now, you have made a claim of 10 percent
83 of your disbursements. A. That is right.

Q. Of \$321,558.90, have you not? A. That is right.

Q. Now, at the time you prepared the last will and testament of Mrs. Buchholz, you knew that you had been named as co-executor of the son's estate, and you were qualified at that time, did you not? A. No, I don't believe I qualified at that time, but Mrs. Buchholz knew about it, and had known about it quite a few years even before her death, that I was the co-executor of the estate of her son, and I was also, prior to his death, the executor of her estate. Although she made a new will subsequent to Freddie's death.

Q. You knew of the contract in existence between the mother and son with reference to the operation of the business, did you not? A. Discussed it a number of times with both of them.

Q. She had requested you at one time or another to send him a 60-day notice called for by that contract? A. Quite often. And she would always withdraw the direction a few—well, a couple of hours—after she had asked me to do it.

Q. Didn't you expect, and didn't think it probable, that as a result of this agreement, that there might be
84 disputes between the two estates? A. No, I don't see anything even today that might cause any dispute.

Q. You don't think there has been any disputes? A. I don't say that there has not been disputes, but so far as I am concerned I see no reason for a dispute. I think the statement is very clear. What they have done over a period of 19 or 20 years should be the guiding point in the way the agreement should be looked at.

Q. Do you think, then, that you could have acted and did act as a faithful administrator in the administration of these affairs in this estate, in view of your also representing Fred Buchholz' estate as executor? A. Certainly. I don't see any harm in it. I have not done anything wrong. If I had done something wrong you could present it here now.

Q. Now, you—in your first account—placed in that account a debt claimed to be due to Fred Buchholz in the sum of \$36,196.64, did you not? A. That is right.

Q. If that money had been paid, it would have been paid to you as executor of the estate of Fred Buchholz?

A. It would have been paid to the estate of Frederick Buchholz, that is correct. It was not paid.

Q. It was not paid? A. No.

85 Q. Why was it not paid? A. Exceptions were filed and the account is still pending in the Court of Appeals as is the suit by the National Metropolitan Bank.

Q. The National Metropolitan Bank, then it brought a suit against the estate, against you, as executor of the estate of Christina Buchholz, for this \$36,000? A. Yes, and you had requested that in the event of a suit being filed, that I turn over the papers to you, which I did, and let you defend her.

Q. And we filed a motion to dismiss, isn't that correct?

A. I don't know. I have never followed it after that.

Q. You have not followed it? A. I know that it was dismissed and that it was appealed.

Q. And it was appealed? A. That is right.

Q. Now, you also placed in your first account the sum of—

The Court. Now, we are not dealing with the first account. We are dealing with the second account.

That is what I understand. Am I correct in that understanding?

Mr. Edrington. This is an allegation—

86 The Court. Just a minute. Am I correct in that assumption?

Mr. Edrington. That is correct.

Mr. Quinn. May I make it clear, just for the purpose of this, your Honor?

You will note in the first part of this we set forth the situation and the contention that Judge Edrington just made, that the account in this case was hostile to the residuary legatees, and that he was favoring the estate of Frederick Buchholz, of which he was a co-executor with the National Metropolitan Bank, and this is one of the incidents we claim goes to show that.

The Court. Well, Mr. Quinn, suppose he was. Suppose he was openly hostile. Does that in any way derogate from the correctness of his account?

Mr. Quinn. Of course, in addition to the correctness of his account, which we will come to, it is a question of what commissions he would be entitled to, because that goes to the nature of the services he rendered.

The Court. Well, the allegations made here with reference to his commissions are that they are excessive in that he asked for the maximum provided by the statute, that is, 10 percent.

Isn't that correct?

87 Mr. Quinn. Yes, and then we go on to cite other things that he did, and the reason why he should not have.

The Court. I know, but what I cannot see or understand—perhaps I am unduly obtuse in the matter—is this: the executor has filed his second account. That is objected to for various reasons. One of the reasons is that his commissions, and the amount that he seeks as commissions, is excessive because he asks for the maximum under the statute.

Now, the only other reasons are that there has been some hostility, open or otherwise, between him and the residuary legatees, but if there is hostility of that character, that does not in any way derogate from the correctness of his account.

Mr. Edrington. That is correct, your Honor.

Mr. Quinn. But in addition to the correctness of his account, it goes to the matter of his commissions.

The residuary legatees have been put to the expense of employing counsel to fight these things which would have depreciated their share a great deal.

Now, for instance, they say that the said commissions claimed by said executor should be allowed by the Court by reason of the following circumstances.

Then they recite the history of this effort to have \$36,000 paid out of the mother's estate into the son's estate from alleged debt and to have the mother's pay a share
88 of the son's funeral expenses, who had died before that, and left a very substantial estate.

They had to go in and file the exceptions to that and combat that, and these exceptions were sustained by Judge Holtzoff.

Then a suit was filed by the National Metropolitan Bank—Mr. Doherty did not join in that suit—but they filed as one of the executors of Fred's estate for this same \$36,000, and we filed a motion to dismiss and that came before Judge Bailey and he sustained the motion to dismiss.

Then they recited in the next one, and the reasons why these commissions should not be allowed is the fact that under that same contract, under which they combated this claim of a debt, from the mother's estate to Fred, the mother's estate was entitled to the lease on the premises 1411 Pennsylvania Avenue, and they demanded that he include that in as one of the assets of the estate, and he refused to do so.

Then there was a claim which he was advised of, request was made of him that he present a claim and prose-

cute it for \$119,000 against the son's estate, and he refused to do it.

And we had to bring a suit, as residuary legatees, and name him as one of the co-defendants in the estate, and file the suit against the son's estate for \$119,000, and that is pending in this Court.

The Court. Am I correct in concluding that the gist of this action is directed to Mr. Doherty's activities
89 in trying to be Peter on one side of the fence and Paul on the other?

Mr. Quinn. That is right.

The Court. In other words, in representing the son's estate and also representing the mother's estate in the capacity of executor to both, and the interests are diametrically opposed; is that it?

Mr. Quinn. That is it, and I might say, if your Honor please, that when I first came into this matter and was consulted about it, I wrote Mr. Doherty about that situation and expressed the fear that he was representing antagonistic interests; if he attempted to act as executor in both estates, and suggested to him that he ought to determine to retire from it.

The Court. Let me ask you this: Are the residuary legatees of the son's estate the same as the residuary legatees of the mother's estate?

Mr. Quinn. No. The principal beneficiaries of the son's estate is his daughter, and his daughter acquired—also acquired—the real estate by reason of the fact that Mr. Buchholz, Senior, had left a life estate to his wife, and Fred had died in the meantime and the daughter came into it in that way, and the mother did not leave anything to this daughter because she was hostile to Fred's children.

The Court. Let me ask you this question: Why was not there an effort made by virtue of diversity of interests to have Mr. Doherty either fish or cut bait with reference to one or the other of the estates? Why was not some effort made to remove him as executor?

Mr. Quinn. Now, if the Court please, in this jurisdiction, as I read the authority, it is practically impossible to have an executor removed unless he is guilty of some misconduct or fraud; I mean in the handling of the funds, or something of that sort.

Now, we did not charge him with that. My purpose in taking it up with him was to show that there was bound to be conflicting interests.

The Witness. May I say that there still has not been any conflict of any kind.

Mr. Quinn. Now, with reference to paragraph 3, and then the subsections 2, 3, and 4, we set out the reasons why these commissions should not be allowed.

The Witness. May I correct one statement before he goes forward, your Honor?

That is, that these residuary legatees under the estate of Christina Buchholz, in the event that Christine Buchholz, Freddie's daughter, dies before she reaches 30, they get the residuary money of that estate. In other words, it all goes to them.

The Court. All right.

Mr. Quinn. Now, then, the other reason that is set forth is what Judge Edrington referred to, and that was that this real estate was converted into cash without these people being consulted at all, and they could have elected probably to take it in kind, especially on the rise of the real estate market, or they might decide to keep it as an investment.

The Court. Well, gentlemen, then I can conclude that what is set forth here is, in effect, the gravamen of your exceptions.

These are your exceptions.

Mr. Quinn. With reference to the commission. That is one of the things.

Now, you come to the next, the fourth. We say that he has not properly administered the estate, and then we come on page 4 to itemize those things, and you find that we have here:

“(a) He has failed to charge himself with the profits of the operation of the Occidental Hotel and Restaurant for the period February 1, 1945, to October 31, 1945, in the sum of \$18,309.61; that the cash on hand reported by the executor in his second account and to which your residuary legatees except is reported as the sum of \$147,308.61, whereas said amount should have been reported as \$165,618.32.”

The Witness. May I answer that, if your Honor please, now?

92 Mr. Quinn. I was going to come to your answer on that.

The Witness. Well, Miss Brown—when I first filed my first account I sent a copy to Mr. Edrington. It was not added up at all. I never add up the accounts because they change it for court costs and everything in the Register of Wills' office.

That was added up in the Register of Wills' office, and the error was made there, and went through added by them, and I just showed what I had at that time, as requested, and it shows on the records that I had more than they called for, and on top of that Mrs. Brown told Mr. Edrington about that. He did not find it out. Mrs.

Brown told him about it, and said it would be corrected in this account.

Why it was put in this account, I don't know, except for one particular purpose.

Mr. Edrington. I object to that. That is a hearsay statement, sir, and I would like to get it out of the record.

Our auditor found it and we went to Miss Brown and called her attention to it.

Mr. Quinn. The auditor employed by these residuary legatees, at some expense, is the one who discovered this error, your Honor.

The Court. Your repeated assertion is that what is stated here is correct.

Mr. Quinn. Yes.

93 The Court. All right.

Mr. Quinn. Then we come to the next one as being that he has failed to charge himself with the profits of the operations of the Occidental Hotel and Restaurant for the period from January 15 to January 31, 1945, which according to the audited accounts of the Occidental Hotel and Restaurant amounted to \$1,743.18.

The Witness. That money was taken over from the bank account into the new bank account by me.

The Court. You have answered these exceptions, have you not?

The Witness. Yes, I did, and under oath, too.

The Court. Then I have your answer.

Mr. Quinn. Now, paragraph (c) has to do with where he raised the salaries of the people down there unnecessarily, who were working at this place.

And paragraph (d) states that in addition thereto the said Deaner—that is one of these men mentioned—paid to

himself out of petty cash receipts of the business during the term of its operation the amount of \$675.00 and the said Simmons paid to himself the additional sum of \$575.00, and so on.

And then there was an item in paragraph (e) of \$90.00, which was improperly paid. The executor improperly paid that, representing salary to an employee for services rendered two weeks subsequent to the date of the sale of said business.

94

And paragraph (f):

"That this executor patronized the Occidental Hotel and Restaurant, consumed meals and liquors in said establishment, signed customer checks therefor aggregating \$202.83 which should have been chargeable to this executor personally and the additional sum for meals as above described in the sum of \$32.10 which should have been paid by the said executor personally. That said total sum of \$234.93 was not paid by the said executor but said amounts were charged off on the books of the company as follows:

"To advertising, \$32.10.

"To unidentified allowance, \$202.83.

"And said accounts were by this means charged off the books of the business."

Now, in his answer to that, he says it was customary for employees to get meals and a certain amount of liquor there, but that would not apply to an executor running this business, and, furthermore, it would be no justification for covering the items up under advertising and unidentified allowances.

And then here is another, what I consider a rather serious thing, because I say that under this, if it had been called to the attention of the A. B. C. authorities, the liquor license of this business, which is the

95

most important, might have been revoked. It is only entitled to sell retail.

Yet we say that the executor improperly purchased from this going business under his operation on or about August 14, 1945, two cases of J. W. Dant Kentucky bourbon sour mash whiskey and on another occasion secured and purchased from himself as executor four additional cases of liquors for which C. H. Doherty paid to himself as executor the sum of \$82.00 and \$200.00 respectively, which amounts were below the actual value of said whiskey and upon which the said business would have derived a considerable profit if the same had been sold at retail in the due course of business.

The Witness. All that liquor was sold to people who took it over at the same price, if your Honor please, and it is something that I have done for years, both when Freddie was alive and when Christina was alive, and the residuary legatees did it themselves even during this period of time.

Mr. Quinn. But in this case, if the Court please, this business was being operated for profit, which would inure to the benefit of these residuary legatees of the estate, and the residuary legatees.

And it was taken out at a time, too, when whiskey was not so hard to get by the restaurants.

96 These cases, and Mr. Doherty personally got them wholesale, and they would have been sold for a great deal more than that, and not only that, that business was not supposed to sell anything wholesale to anybody, and risked its license when it was done.

Everything that was sold then in the way of liquor had to be sold by the drink and consumed right there.

Now, the next one, paragraph (h), is another matter.

"In the early part of 1945 Breyer Ice Cream Company, a furnisher of supplies to the business, Occidental Hotel, paid to the business by way of refund the sum of \$797.71"—

Mr. Edrington (interposing). That should be \$667.00.

Mr. Quinn. That should be \$667.00 instead of \$797.00.

It should be \$667.87 instead of \$797.71.

The Court. How much should it be?

Mr. Quinn. It should be \$667.87.

(Continuing):

—"all of which was the property of this estate but that this executor without right paid over to the estate of Fred W. Buchholz the sum of \$594.87 which estate was not entitled to any portion of said sum."

The Witness. If your Honor please, I would like to answer that particular one.

Mr. Quinn. Just let me finish, please.

The Witness. All right; go ahead.

97 Mr. Quinn. And that was paid over to the estate of Fred W. Buchholz.

Now, under this same contract, under which Judge Holtz-off sustained these exceptions, and Judge Bailey sustained the motion to dismiss, it was provided, if the Court please, that upon the death of Mrs. Buchholz—I mean the death of Fred Buchholz, that if he died while operating that business, before his mother died, that every asset of that business of whatsoever nature should revert to her and that any and all interests of whatsoever nature that he had in that business or assets, would end. And this was something that was due—refunds due during the year 1944, and he died in November, 1944.

Of course it was an asset, it was plainly an asset of that business. It was something due the business and it reverted to the mother.

Then, in that same paragraph, you have this situation, that on January 24, 1946, Breyer Ice Cream Company made a refund to the business being operated by this executor—and this business was sold as of the close of business on January 31, 1946—in the amount of \$600.37, which amount was not credited as receipts on the books of the company and no account therefor has been made.

And an investigation was made of that and we took a deposition up in Philadelphia, and they found the
98 check. The check was dated January 25, 1946, and made payable to the Occidental Hotel, and that was the way they carried their business account, and for some unknown reason this was never shown on the books of the company and it was never cashed until April, 1946, and then we find a rubber stamp endorsement "Occidental Hotel" and underneath that the endorsement "Credit to account of Occidental Restaurant and Hotel, Inc.", which was the name of the purchaser of this business, and in April those people that he had sold to cashed this check.

What became of it in the meantime, between January 25 and 26, and the time the business was closed out as of his operation on January 31, we don't know.

The Witness. Now, I would like to answer that, if your Honor please.

It is something I did not properly answer in my answer because I was going on the statement of the certified public accountant.

We have had a certified public accountant at the Occidental Hotel for 26 or 28 years, John McGinley, of McGinley & McGinley, besides the regular auditor, and I took his records all the way through as proper. He is a C. P. A.

In May of the past year, Mr. Edrington called upon me to turn over all the books and records to a certified public accountant, so that he might check every item of the business of the Occidental Hotel.

99 I said I would be glad to do that provided he gave me a copy of that audit, and he said he would, and I brought over all the records that I had over in Virginia, even had to get a truck to bring all that stuff to the hotel, and the audit was made and I asked him for a copy of the audit and he said because the audit had been given to his residuary legatees, his clients, he could not give it to me.

Now, if I had had the copy of that audit, I would have seen this one particular mistake about this \$600.00, which I will now explain, and I am still entitled to a copy of it. The residuary legatees are in Court, and under those circumstances, having turned over all the records and gone to the expense of bringing the records here for them, I think I was entitled to that, at least.

The Court. Why should the purchases of a business exceed \$600.00 in the nature of a refund that should have gone to the original owners on the 1st of January?

The Witness. It was not during the operation.

If you will let me answer, Mr. Quinn, I will.

The first amount that you talked about, back in December of 1944, was \$667.87, you say I paid that over to the estate of Fred Buchholz. That is not true. That went over as a paper accounting and that was a part of the audit made by McGinley & McGinley setting up the 36,000 some-
odd dollars due the estate of Frederick Buchholz
100 which Mrs. Buchholz told me to pay prior to her death.

We discussed that thing very fully and she understood and felt, and honestly, that the money was due the estate of Frederick Buchholz.

It had been gone through over a period of 22 years, had been going by this agreement, and that was the way they had it. McGinley had a certain audit made of the books, except for Freddie's personally, and he had them from the hotel, and he had this amount of money showing as owing to Fred's estate, to Freddie, on his own books, and on which we paid income tax.

Now, this \$36,000 that they are talking about, if it isn't paid to Freddie's estate, it is going to cost us approximately \$35,000 in tax.

The Court. I am talking about the \$600.

Mr. Quinn. Whether this was a paper transaction or not, Mrs. Buchholz' estate never got this \$667, did it?

The Witness. No.

Mr. Quinn. Freddie has got it?

The Witness. No, he has not got the money at all. The money is all in the estate.

The Court. \$600.37, as I understand it, went to the purchasers of the business.

The Witness. This is another one. This is the first one we are speaking about.

Mr. Quinn. That is another one.

101 But the first item, \$667, wasn't it?

Mr. Edrington. \$667.87.

The Witness. That money is still in the estate of Christina Buchholz. It has never been paid over, but it is carried as being due the estate of Frederick Buchholz, in that \$36,000 item.

Mr. Quinn. But it makes a debt, then, the way you calculate it, from Mrs. Buchholz' estate to Fred's estate?

The Witness. Yes, until such time as that is disposed of.

Mr. Quinn. That is what we are trying to do now, dispose of it.

The Court. All right.

Mr. Quinn. On this other item——

The Witness. That is the one I want to talk about now.

Mr. Quinn. This \$600.37.

The Witness. I called upon McGinley & McGinley after I received this statement and asked them to check into this, which they did, and I told Mr. Edrington if he would have given me the information I would have found out before. After the new corporation took over from me and from the 1st of February 1946, on, they collected certain accounts. They came in and checked them off on their books, money due the old Occidental Hotel, and then we had the audit and the money was paid over to me, collection of old accounts. Some of them ran around something like \$2,000.

Mr. Quinn. Have you got this \$600.37?

The Witness. I have it now. McGinley didn't find it. He audited both books. The books of the Occidental Hotel for me, and he did it then for the new hotel, and I have the money here now, just given to me.

Mr. Quinn. You mean it has just been given to you?

The Witness. Yes. It was an error. It was a mistake. If that is the only mistake you can find——

The Court. Just a minute. I am going to insist on an orthodox manner of procedure here.

My question was, do you have the \$600.37?

The Witness. Yes, your Honor.

The Court. I drew from your testimony the inference that the reason why you did not have it before was the auditors made a mistake.

The Witness. And I took their word for it, that they made a mistake.

The Court. But you have it now, in your capacity as executor of the estate of Christina Buchholz?

The Witness. Yes, your Honor.

The Court. All right. That is straightened out, isn't it?

By Mr. Quinn:

Q. When did you first learn of this \$600.37 being
103 in the hands of the Occidental Hotel? A. After you filed the exceptions. We found it out in the audit, and we would have straightened it out if you had told me about it.

Q. And before you filed your answer? A. No, I didn't know it then.

Q. You make a statement in your answer, in answer to paragraph (h)— A. That it was a misstatement of fact, and I thought it was at the time.

Q. A definite misstatement of fact, you said.

Had you ever talked to Deaner, the man who was one of the purchasers of the business, about these items that might be collected, that were due the business as you operated it? A. Yes, for three or four months afterwards, and we finally had a settlement about the 1st of May, and I took the records of McGinley & McGinley and audited the whole thing and brought it up to date.

Q. When did you talk to—before we filed these exceptions, when did you last talk to Deaner about refunds or anything else which were supposed to be turned over to you? A. I think it was last July or August. There is no question but what he had it. There is no question but that it was in the hotel, and it was a mistake.

Q. But did he tell you in July or August that
104 he had it? A. No, he didn't. He did not know it.

Q. He did not know it? A. When I brought it

up to him this time he did not know it, and McGinley could not find it, and we sent up to Philadelphia, just the same as you people went up there to take a deposition, and I told you it was not necessary to go there, that I would get all the information.

The Court. But in any event, you have the \$600.37?

The Witness. Yes, your Honor.

The Court. All right.

By Mr. Quinn:

Q. Did you know that Deaner had written to Philadelphia about this check last summer? A. Not last summer, I don't know about last summer.

Q. Yes. A. No, it was not about that check, it was about the other check. You are talking about the one in 1944 that you were asking about, that is the one I called on, and I got a letter—I took it up immediately with the auditors and asked them to find out about it, and that referred only to the check that Mr. Edrington spoke about, which was the one in 1944; not this one at all.

Q. Did Mr. Edrington tell you some time ago, in July, about this check of \$600.37? A. No, he didn't. He
105 never mentioned that at all. He talked about the one that came in December of 1944.

Q. I am asking you about this one that was due for refunds in '45, and didn't you then call Deaner up about it, and didn't Deaner write to Philadelphia about it? A. No, I will show you the answer.

Q. And then after that nothing was done? A. No, that is a different thing.

Here it is. In July 15, 1946, I called upon McGinley & McGinley, to check into that particular check, and here is the answer.

Now, let me read it.

Q. Wasn't that because Judge Edrington had told you about it? A. That is right, and here I got the answer. But he referred to the check, not this one you are referring to now, this \$600. He is referring to the one back in 1944, and here is the answer in July that I got from McGinley.

Q. Now, before you give the answer, this item of \$600.37, the exception to that is that it was not credited to assets on the books of the company and no account has been paid.

Mr. Quinn. That is right.

The Court. Now, an accounting has been made, and it is explained, unless you are alleging malfeasance upon the part of this executor.

106 Mr. Quinn. I alleged carelessness on his part, your Honor.

The Court. That is entirely different. It is not malfeasance, so the money has been found and satisfactorily explained in the absence of malfeasance.

Mr. Quinn. Our contention with reference to that is, then, that Judge Edrington called Mr. Doherty's attention to it in July—apparently somebody called his attention to it in July, because he took it up to find out.

In the meantime nothing was done, and this account was coming on, and we employed an auditor, and then finally I served notice to be ready for this thing about this deposition in Philadelphia and went and took it.

The Court. But the end result of your stricture is that it was carelessness on his part in administering the estate and also by virtue of the difficulty in which he presumably ought to be in, from your point of view, in trying to play fish with one and fowl with the other?

Mr. Quinn. Yes.

The Court. All right.

The Witness. Would your Honor let me read this letter so there won't be any question about what he tried to get?

The Court. You can submit the letter to me.

The Witness. Well, that would not answer much.

The Court. I beg your pardon, Mr. Doherty?

* * * *

107 The Witness. I don't think that would answer much unless I explained it at the same time.

He asked me about this particular item of \$600 in July, and this letter will show what I asked for. It comes from McGinley & McGinley.

The Court. I am only concerned with what he asked for in July.

The Witness. That is what it is. I say, he asked for it in July. Not this \$600 that he is talking about now, but another check of a prior year.

The Court. Then your point is that the check that he thought he was asking about in July, which he thought was a \$600 item, was another item?

The Witness. That is right.

The Court. May I have that letter, please?

The Witness. Yes, Your Honor.

(The letter was handed to the Court.)

The Court. Now, we are talking at cross purposes. This is with reference to a \$667 item.

I am interested in the \$600 item, \$600.37.

The Witness. All right.

Mr. Quinn. This deposition, if the Court please, which will be here in the file, from these people in Philadelphia, will show that on July 9 Mr. Deaner, the manager of this business that was taken over after the sale, wrote
108 to the people in Philadelphia about this check, about the \$600 check, and yet, notwithstanding the fact that Deaner is advised of it and all, and told just what it shows, and everything else, nothing is done, and we have to go and take the deposition.

The Witness. You didn't have to. I told you you didn't have to. I would get all the information you wanted.

Apparently you just wanted a trip.

Mr. Quinn. The next item is at the time of Fred Buchholz' death on November 22, 1944, he was indebted unto Christina Buchholz, his mother, in the sum of \$5,000 for past due rent on the premises 1413 Pennsylvania Avenue, Northwest, Washington, D. C., and that this executor has failed and neglected to collect the said sum of \$5,000 due this estate by the estate of Fred W. Buchholz.

The Court. What is the proof of that?

Mr. Quinn. The proof of that is—our auditor is here and can tell you that.

The Court. Was there a lease?

Mr. Quinn. This property that was referred to was the property which Mrs. Buchholz had a life estate in, and the son was supposed to pay so much rent under this agreement they had, and the rent that had accumulated was not paid at the time of his death and has not been collected for the benefit of the mother.

The Court. In other words, there was a lease
109 arrangement between the mother and the son?

Mr. Quinn. As a life estate.

Mr. Edrington. Isn't that correct, Mr. Doherty?

The Witness. May I answer that, if your Honor please?

The Court. All right.

The Witness. In the first place, that money was considered in the \$36,000 item by the auditors as the amount that was due the estate of Frederick Buchholz. When he died, approximately \$50,000 was what Mrs. Buchholz thought she would have to pay to Freddie's estate, and then when the auditors finally got this report up, after the death, it came to \$36,000.

In the answer to that \$5,000—after the National Metropolitan Bank sued for that \$36,000, I turned over the defense of that case to Mr. Edrington. He wanted to take care of it. Now, if there was this amount due at that time, he should have set that up as a counter claim. There is no question about it. He had the audit. He had all the books and all the records at that time.

Mr. Quinn. That is not the question.

The Court. Just a minute, gentlemen. I don't want to continue interrupting, but, after all, I have to decide this matter, and I have to know what I am doing.

This item is to the effect that Fred Buchholz on his death was indebted to his mother in the sum of
110 \$5,000 for rent on the property occupied by the restaurant.

I asked counsel what the property was, and I was told it was a life estate.

Mr. Quinn. That is correct.

The Court. Then I asked if there was anything in the nature of a lease between the parties, and I am told there was.

The Witness. There was an agreement, your Honor.

Mr. Quinn. An agreement on which Judge Bailey and Judge Holtzoff passed.

The Court. You can call it an agreement, a lease, an understanding, or anything you want, but there was some definite arrangement whereby rent was due?

Mr. Quinn. That is right.

The Court. All right. Has that been paid?

The Witness. No, it has not been paid, your Honor. There is no money that has been paid.

The Court. And why not?

The Witness. That outstanding account of \$36,000, which is still in litigation, is the reason.

The Court. What is this outstanding account of \$36,000?

The Witness. That includes the whole thing.

When Freddie died—

The Court. In other words, your claim is that the estate of Fred Buchholz was owed \$36,000 by his
111 mother's estate; is that it?

The Witness. That is right, and the mother, after Freddie's death, told me to borrow the money to pay off, and I told him it was not necessary to do that.

The Court. How do you get the rent of \$5,000 owed by Fred to his mother as part of the rent that Fred owes his mother?

The Witness. I will have to explain that, your Honor.

After Fred Buchholz died, the property in which Christina Buchholz had a life estate, reverted to her, including the business of the Occidental Hotel.

In 1926 there was this agreement between Christina Buchholz and her son Frederick whereby she turned over

the business entirely to him, with the definite understanding, whether it is said in the paper or not, that he was to have the profits of that business. There was immediately set up two sets of books; one private books for Freddie himself personally, and the other for the hotel.

And McGinley and McGinley, certified public accountants, audited those books and they carried along at certain times and Freddie would owe the hotel account a certain amount of money and at certain times the hotel would owe Freddie money.

And finally when he died, McGinley & McGinley audited the books, brought them up to date, offset that amount of money which he owed his mother and the hotel, and
112 all that, and finally came to the conclusion there was \$36,000 and some-odd cents due the estate of Frederick Buchholz.

This was told to Christina before she died, and that is the \$36,000 that is in litigation now.

Freddie's estate has already paid the income tax on it and which does not mean much, because it amounts to approximately \$34,000 in taxes if paid on that \$36,000.

The Court. That is your explanation?

The Witness. Yes, sir.

The Court. All right.

Mr. Quinn. His formal answer to that is something to this effect:

"Your executor states that the rent was properly adjusted"——

The Witness. That is right.

Mr. Quinn. Just one moment, please.

(Continuing):

——“as of the date of the death of Frederick W. Buchholz and it was so accepted by Christina Buchholz.”

Now, when Mr. McGinley testified before Judge Holtzoff on the exceptions to this \$36,000 item he is talking about, Mr. McGinley said that that represented undisturbed profits which had been invested in a large liquor stock several years before Fred died.

That is what he testified to.

113 Now, our report shows that Fred had issued, or there was issued at one time, checks representing this rent for July, August, September, and October, 1944, and they were canceled and the amount of \$5,000 was credited to the accrued rents account.

The Court. And you have that in the nature of a deposition?

Mr. Quinn. No; this is our auditor's report.

The Court. You have the testimony for it, however?

Mr. Quinn. Yes, he will testify concerning it.

The Court. All right.

Mr. Quinn. Now, the next thing we complain of is this: that after his first account, although he had large sums of cash in his possession, he refused to make a distribution of any part thereof to your residuary legatees and made it necessary for them to file proceedings to force a distribution, and that he now has a large sum of money on hand and still does not file his final account or make further partial distribution.

The Witness. I cannot file a final account until all the litigation is over. They have more litigation started in this case, and a lot of it is unnecessary, to my mind, but I cannot——

The Court. Your point is that you cannot file an account until there is something final to do?

* * *

114 Mr. Quinn. * * * That at the time he assumed control of the business and at the time the business was sold, there were on the books of the business a large number of accounts receivable representing moneys due the business by customers in and about Washington, and except in one or two instances this executor has taken no steps to collect accounts receivable as was his duty as a prudent administrator.

The Witness. I have collected somewhere in the neighborhood of six or seven hundred dollars.

Mr. Quinn. Where is it shown in the account?

The Witness. That was in accounts receivable. There was approximately \$3,100. I think your auditor will tell you. It does not show in the account. It shows in the amount of money that I got from the Occidental Hotel.

That \$3,100 in accounts receivable is reflected in
115 the profits that were made in the business last year.

The Court. Well, then, you say it is in the account under another item. Is that it?

The Witness. Yes, your Honor. There is no question about that. I have not collected them all. A lot of those you just cannot collect.

The Court. Counsel's question was whether or not that item is included in the account, and I drew the inference from your testimony that it is in the account but it is a lump-sum; is that right?

The Witness. Yes, your Honor.

The Court. Where is the sum?

The Witness. It comes in the money that was taken in as executor.

If your Honor please, I have this statement from McGinley & McGinley which shows——

The Court. No. May I ask you this question: I have your account here, filed November 6, 1946.

Now, where are those items?

Mr. Edrington. There are only two in there, if your Honor please.

One is under the heading of Gustav Blank, and another one, a man by the name of Harnigan, or Hornigan, something like that. Only two items collected, a very small amount.

And they are designated in the account.

116 The Witness. May I see that, if your Honor please?

(The document was handed to the witness.)

They are reflected in this amount of money that has come in here, in that \$77,506.

The Court. That item is on page 3, "Proceeds of sale of business under order of Court of January 25, 1946."

Mr. Edrington. We dispute that, if your Honor please. That is actual price of assets.

The Witness. I am wrong in that, if your Honor please.

Mr. Quinn. He admits his error on that one.

The Witness. Yes, I do.

Now, over here, if your Honor please, in the profits, that amount of money indicates the amount that has been taken in (indicating).

The Court. Which is that?

The Witness. It is right in here, your Honor (indicating).

The Court. The witness points to the following items on page 3:

The general item, operation of business from last accounting to date of sale; forwarded from 1st account, that is the detail, \$18,309.71, and profit for November 1945, \$3,471.36, and loss for December 1945, \$5,718.42, and profit for January 1946, \$5,200.22.

He says that the items referred to are reflected in those accounts.

117 The Witness. If your Honor please, the accounts receivable of \$3,323, is reflected in the amount of money that was made in the profit of the business.

The Court. So then you say that the profit for November of 1945 of \$3,471.36, and the profit for January 1946, of \$5,200.22, reflects this item of thirty-three or thirty-four hundred dollars?

The Witness. Yes, your Honor.

In actual cash. Here is the statement I got from McGinley & McGinley, showing the accounts receivable as of that time of \$3,323.17, which was the amount of money outstanding as of February 1, I believe. Then there has been collected——

Mr. Quinn. May I ask a question?

By Mr. Quinn:

Q. Do you contend in the item referred to that they are reflected in an item of profits for the business? A. Oh, surely.

Q. For the period up to the time you closed? A. That is right.

Q. Well, didn't Mr. McGinley tell you that this item of accounts receivable totaling over \$3,000—— A. \$3,323.

Q. Was an asset of the business at the time you
118 closed and sold? A. No.

Q. He didn't tell you that? A. No, he didn't. He told me he carried that as a part of the profits.

Q. Why was it that two items of the accounts receivable that you collected were specified in your account, if you take all the others that you collect and reflect them in profit? A. Because I collected those personally through the office, and I put those in my executor's account, my personal account. This money has come through to me from the Occidental Hotel account, and I never collected that in the personal executor's account.

Q. Have you any record or book to show, for instance, that the accounts receivable, totaling over \$3,322 as of January 31, 1946, have been collected? A. All of them?

Q. Yes. A. Part of them.

Q. All that you have collected? A. No; part of them——

Q. Are they shown in any place in the books as having been collected on your records? A. Only in the cash item, that is all.

Q. Mr. Doherty, aren't you mistaken about that
119 when you say that those have been collected? A. No, I am not mistaken about that at all, because it was between the 1st of February and——

Q. Now, for instance—— A. Wait a minute. Between the 1st of February, I think, and the 1st of May——

Q. Of '46? A. Of '46. \$2,121.37 was collected on delinquent accounts, and that money has been——

Q. Did you have anything to show which delinquent accounts they were? A. Oh, yes. We have the records of the particular ones; surely. I don't have them here.

Q. Well, were they the records that our accountant had? A. He had everything.

Oh, no; wait a minute. They were collected through the hotel, the Occidental Hotel, and they were reflected on Mr. Deaner's books.

Q. On whose books? A. On the Occidental Restaurant and Hotel, as it now exists. And then it was turned over to me, and it was audited by McGinley & McGinley and that \$2,121.37 came to me and I have the money. There is nothing to worry about. I have that amount.

120 Q. And the only place the collected accounts receivable is reflected is in this large item of profit that you have, then? A. Well, the \$3,100, or a little bit more than that, \$3,327.17, is reflected in the profit of the business as accounts receivable. That is part of the profits.

The Court. Well, the gist of this exception is that he has neglected to collect the accounts receivable?

Mr. Quinn. Yes.

The Court. Now, you say that you have collected them?

The Witness. Not all of them, if your Honor please. I have collected all I could. There are quite a few of them.

The Court. How much money is outstanding in the nature of accounts receivable?

The Witness. \$3,327 was, and there is approximately, I would say, now, eight or nine hundred.

The Court. In other words, you have collected about \$2,500 to accounts receivable?

The Witness. That is right.

The Court. And there is about eight hundred or more or less left?

The Witness. That is right.

Mr. Quinn. We would like to see some record of that.

The Court. I would suggest that you present some record to them.

121 The Witness. Mr. McGinley will give you anything you want.

The Court. You will present him with a record?

The Witness. I will do that.

The Court. All right.

By Mr. Quinn:

Q. You have some accounts receivable written off, for instance, according to your records, from the period—through the period January 15, 1945, to January 31, 1946?

A. A lot of those were carried over from Freddie's when Freddie would give checks to people who would never pay them, or people—bills people wouldn't pay.

Q. Heading the accounts receivable written off was one of your own for \$32.10; that was charged to advertising, wasn't it? A. That is not a bad account. That is the—

Q. But you have accounts receivable written off; why was it put that way? A. Well, I will admit that I had a few drinks at the hotel over the period of a year or fourteen months. They do it all the time. I think it is so small that—

The Court. Just a minute, please. I don't want to have lawyers on the stand.

The Witness. They put me on.

The Court. I know.

122 Now, as I understand it, Mr. Quinn, the stricture leveled here was that he has taken no steps to collect said accounts receivable, as was his duty as a prudent administrator.

Mr. Quinn. That is right.

The Court. He now says that those total accounts collected aggregated somewhere in the neighborhood of \$3,300.

Mr. Quinn. Yes.

The Court. That he has collected about \$2,500 of those accounts, so to speak, and he has that money in cash. Right?

Mr. Quinn. Yes.

The Court. And he also says he is willing to submit to you and Mr. Edrington such records he has of all the accounts receivable during his executorship. If he does that and he has the bulk of them collected, then this item, presumably, might fall, with the exception of certain items that you claim were charged as accounts receivable, including this \$32.10, which——

The Witness. That was not carried as accounts receivable, your Honor.

The Court. He says it was.

The Witness. Oh, well, he is wrong.

The Court. Mr. Quinn, the witness says that you are wrong with reference to that \$32.10 item, that it is not carried as accounts receivable.

123 Mr. Quinn. We found it on the books as accounts receivable.

The Witness. Not as accounts receivable.

Mr. Quinn. As accounts receivable, written off, I say.

The Court. Well, it is an accounts receivable, and never was collected; is that right?

Mr. Quinn. And written off.

The Witness. And no intention of ever paying it, if you Honor please.

The Court. All I am interested in is, whether or not it was accounts receivable.

The Witness. Maybe it is. It is not carried in my books.

The Court. All right.

By Mr. Quinn:

Q. Now, is this the form of a rebate or allowance that you used down at the hotel (handing paper to witness)?

A. Yes.

Q. Is that right? A. Yes.

Q. Whose signature is that on the back; Mr. Deaner, the manager? A. That is right.

Q. He was employed by you? A. At the hotel; yes, sir. Co-manager was Mr. Simmons.

124 Q. And why was that slip or rebate allowance made to you for that amount of money? A. Bookkeeping purposes. That is a part of these meals that I had at the Occidental. I was down there time and time again at dinnertime and lunchtime, and working. I spent approximately 600 hours during the year down there working on books and records. There was a number of times I was there at dinnertime that I didn't eat, I had to go home to keep peace in the family, that I didn't eat, that I thought I was entitled to it.

Every one of the employees, your residuary legatees, and Fred Merkle, who was there for a long time, they all had their meals there.

Q. But the residuary legatees or any of the people who were employed there, when they were allowed for meals or drinks that they got, that was shown properly, wasn't it, just what it was for? A. There is nothing improper about this. I signed the regular check. Instead of putting it on an employee's check which would go through in the regular course, this was put on the regular check and it had to be cut off for the purpose of books and records, and I think your auditor will tell you that.

Q. Why was \$32.10 that you consumed down there, charged to advertising? A. I don't know how.
125 I didn't know it was charged to advertising until I saw it in there. It was charged off for the purposes of the records.

The Court. Let's go on, please.

The Witness. I will pay \$32, if he is worrying about it. I am not worrying about it.

The Court. Let's go on from here.

Mr. Quinn. The next one refers, if the Court please, to a \$25,000 note, borrowed for and credited to the business of the Occidental Hotel.

"That your exceptors are advised by its auditors that it appears that said note was paid out of business receipts in the normal conduct of the business and that the same does not appear as having been paid out of the general assets in the hands of the executor. That under the circumstances the executor is not entitled to credit and allowance for the sum of \$25,166.67 allegedly paid in retirement of said note and interest, and should be required to account for same."

The Witness. I believe it was about the 28th of January, that Mrs. Buchholz, having died on the 15th of January, and all the money in the Occidental Hotel at that time at the National Metropolitan Bank was held up, and this note was paid out of that amount of money which was turned over in my name as executor, so that the sum of money
that come into my hands, which I assumed was in
126 my hands, was the \$25,000 of this note which I put in the account, and which is proper, and the note has been filed in the first account, and nothing was said about it in the first account. It was a proper item.

Mr. Quinn. Of course, our items didn't get in until after

that first account, and then from what they can find, this note was paid out of business receipts during his operation, if your Honor please.

And it was a debt of Mrs. Buchholz, and existing at the time she died.

The Court. I understand the witness' testimony now to be that he paid it out of the assets of her estate after her death.

Mr. Quinn. There is nothing on our auditor's account. They cannot find that situation at all.

The Witness. The vouchers here will show that.

The Court. The testimony is that the probate records of his first account indicate that that is a fact.

By Mr. Quinn:

Q. Where did you carry the business account, in what bank? A. Riggs.

Q. In the Riggs Bank? A. Yes, sir.

Q. Is that Occidental Hotel, by you? A. I have 127 two accounts in Riggs. One was the Occidental Hotel, by me as executor, and also my personal executor's account.

Q. You mean, then, the estate the Christina Buchholz, by you as executor? A. That is right.

Q. Out of which one of the accounts was that note paid? A. Out of neither of those accounts. It was out of the account that was existing at the National Metropolitan Bank at the time of Christina's death.

Q. How long did that account continue after her death? A. I had no account there. That was closed entirely afterward. And this note became due, I think it was the 28th. It is written on the note and the note has been filed in the vouchers, and credit taken in the original account.

I don't know whether I signed that note on her behalf or not.

The Court. Well, your statement is, in any event, it was paid out of the assets of her estate and that the probate record indicates that?

The Witness. That is right.

The Court. All right.

By Mr. Quinn:

Q. Is there one check for that note? A. I don't think so.

Have you one canceled check for that note or was
128 it a series of payments? A. No, it was paid out of the fund when we made the arrangements with the National Metropolitan Bank as to the amount then due the estate.

The Court. You mean the bank simply took the cash out of the account?

The Witness. That is right.

The Court. And credited the account with the payment and took the money for its own use?

The Witness. And turned over the balance to me, what was left in the account.

The Court. There was no check, then, was there?

The Witness. No, no check.

The Court. In other words, the bank reached into the account, took out \$25,000—

The Witness. That is right.

The Court. Have you anything from the bank indicating payment?

The Witness. The note. It is in the vouchers there.

The Court. The note of surrender?

The Witness. That is right. I have it here.

The Court. All right.

By Mr. Quinn:

Q. In your first account you show a balance in checking account, National Metropolitan Bank, \$44,219.73. Do
129 I understand that was the amount of cash in that account at the time of Mrs. Buchholz' death, on the date of her death? A. Yes, I think that is the amount that was there.

Q. And is that in what is known as the business account of the Occidental Restaurant? A. Yes, that is right, Occidental Hotel and Restaurant account.

The Court. Would not you receive a debit notice from the bank to the effect that the account was being charged with \$25,000?

The Witness. Nothing was done for the reason that the account was held up entirely, if your Honor please, at that time. We didn't use that account immediately after the death of Christina Buchholz.

The Court. I know, but in order for the bank to surrender the note, the bank presumably must have received the money.

The Witness. It did.

The Court. And if the bank reached into the account of Christina Buchholz for the account of the business and took the money out, you presumably must have received a debit notice from the bank with reference to the account.

The Witness. That is right.

The Court. Well, is that filed in the account?

The Witness. I don't know. No, I didn't file that.
130 I filed the paid note.

The Court. All right.

By Mr. Quinn:

Q. Mr. Doherty, you secured an order of Court to make certain expenditures for the improvement of the business premises down there, not to exceed \$18,000? A. That is right.

Q. And our clients had consented to the order which you sought for authority to pay that 18—or to have improvements made not to exceed \$18,000? A. That is right.

Q. Is it a fact that you expended a great deal more than the \$18,000? A. Over the period of the year?

Q. No. A. And after that, yes.

Q. In connection with those repairs.

When did you get the order to make those repairs? That was shortly before the close for the summer to make repairs, wasn't it? A. It was some time in June or July of 1945.

Q. And how much did you spend for repairs at that time? A. At that time, or over a period of later? I have not the figures.

I have not all the figures.

131 Q. Well, you did expend about \$5,000 more than the 18, didn't you? A. Not at that particular time. Over a period later on we had to do it to keep the business open.

Q. But didn't you make application for authority to expend this \$18,000 and our consent ran to a limit of \$18,000? A. Yes, that is right.

Q. You didn't go back to Court and get authority to expend anything more? A. I did not. The rest of it was done in the usual course of business.

Q. And the owner of the premises, to which those improvements went, was Fred Buchholz' daughter? A. That is right.

Q. And she got the benefit of it finally, when the business closed? A. Finally, Mr. Edrington informed me at

that time that he was taking over the business, and he had made arrangements to take it over, and he had no objection to anything being done at all. The two residuary legatees were in the hotel and restaurant all the time and they knew what was going on.

Q. Did you ever consult Judge Edrington or any of these residuary legatees about expending more than that \$18,000? A. No.

Q. Did you ever get an authority of Court—I
132 think you said you did. A. No, I did not think it was necessary.

Q. You expended, as a matter of fact, about \$23,000 and some, didn't you? A. Not at that particular time; over a period later on—

Q. I am talking about between the time and August, I think it was, or July, that the place was closed for repairs until your executorship or our operation of the business ended in January. A. Yes, I would say so. That is true.

Q. Now, when you sold to Deaner, or people who afterwards became the Occidental Restaurant and Hotel, Inc., was anything done about prepaid insurance, vault rent, dues and subscriptions, prepaid? A. I don't know what you mean, Mr. Quinn.

Q. Well, there were prepaid expenses amounting to \$2,363.97, and prepaid insurance was \$2,597.65, and prepaid vault rent, \$49-something, and prepaid dues and subscriptions, \$16.67. Amounting to \$2,661.97.

Did you ever collect that? A. I have \$2,597.65.

Q. Did you collect that? A. Yes.

Q. Where is it reflected in your account? A. I assume it is reflected in the amount of money we
133 made over that period of time.

Q. The amount of money you made during that period of time? A. That is right.

Q. This was collected, was it not, after you sold the business and you had ceased to operate the business?

A. On the 3rd of May I made a deposit of \$85,325.15, which I received from the Occidental Restaurant and Hotel, which included the \$77,506.13 which was the amount of money that the business sold for.

Mr. Edrington. How much was that, Mr. Doherty? Give me those figures, please. 77 what?

The Witness. \$77,506.13.

Mr. Edrington. That was for the sale of the business?

The Witness. Well, that was in accordance with the agreement.

Mr. Edrington. All right. Now, what were the other items making up that deposit of \$85,000?

The Witness. \$2,121.37.

Mr. Edrington. And that was what?

The Witness. That was the amount that had been collected from delinquent accounts by the Occidental Restaurant and Hotel, that I referred to a few minutes ago.

Mr. Edrington., All right. And what else?

Mr. Quinn. What date was that, now?

134 The Witness. The 3rd of May.

Mr. Edrington. What else?

The Witness. \$3,100 in cash that was in the petty cash fund.

Mr. Edrington. What else?

The Witness. And \$2,597.65.

Mr. Edrington. For what?

The Witness. Covering the prepaid insurance, general compensation.

Mr. Edrington. Where do you show those last three items in your account?

By Mr. Quinn:

Q. You don't show those items in your account at all, do you, those last three items? A. No, except as I understand it, that was reflected in the amount of money that was of the profits. That is my understanding of it.

Q. Well, would prepaid insurance fund be a profit? A. If you made \$24,000 profit, and paid \$1,000 in insurance, or something, out of those profits, surely it is reflected in the profits. You cannot say that it is something we earned on the outside. It is money we paid out of profits. Isn't that correct?

Q. I don't see it.

The Court. In any event, that is your explanation.
135 He does not see it, but that is your explanation?

The Witness. Yes, sir.

The Court. All right.

By Mr. Quinn:

Q. That is not earmarked in your account, is it? A. That is right.

Q. If it is in there—— A. It is in there. I don't know whether it is down there properly or not, but I have all the cash here, and your auditors went over the hotel account.

The Court. Is there any question, gentlemen, but that the money, \$85,000, is accounted for? The only difference is whether or not it was properly allotted to——

Mr. Edrington. We say it is not accounted for and we will prove it is not accounted for.

The Court. How much of it is not accounted for?

Mr. Edrington. These three items; \$2,121.37, representing collections of delinquent accounts; \$3,100——

The Court. Before you go on, he already says he has \$2,500 and has collected that on delinquent accounts, which is not accounted for. He has testified to that. So that item is out.

Mr. Edrington. Then there is \$3,100 in petty cash. That \$3,100 is not, we contend, in that profit of \$18,000 in round figures that he shows in his account, and
136 has not been accounted for.

The Witness. \$23,000——

The Court. It is \$3,100?

Mr. Edrington. \$3,100; and we say that \$2,597.65, representing refund of cash prepaid insurance, et cetera, is not in that profit and not accounted for.

That is what our auditors tell us.

The Court. So there is an item totaling approximately \$6,000?

Mr. Edrington. Yes.

The Witness. I have the cash here for it.

Mr. Edrington. You may have the cash for it, Mr. Doherty, but you haven't accounted for it.

The Court. Then the \$35 item of John McGinley, as a witness fee, for testifying against the exceptors.

Mr. Quinn. He testified, if the Court please—here is an unusual situation. It shows the embarrassment that an executor had for both estates. He was called by Mr. Doherty to testify in order to benefit the estate of Frederick Buchholz, and he testified about this \$36,000. Our exceptions were sustained.

The Court. That is a charge of \$35 against the estate of Christina Buchholz?

Mr. Quinn. That is right.

The Witness. I put this in because Mrs. Buchholz
137 had told me prior to her death to pay that amount of money. That is the reason I put it in there, and I still personally think it is due.

The Court. All right. I have had the explanation.

Mr. Quinn. It is a small item but it shows the conflict we have.

We say further that included in the total disbursements set forth on which he claims his commission should be based, certain movable assets of the estate which he distributed to the residuary legatees and upon which no commission should be allowed. The amount of that is around \$3,500.

The Court. All right.

Mr. Quinn. Now, that, generally, if the Court please, is our position with reference to this, and our clients have been put to considerable expense.

We have had to get an auditor to check on these accounts and they have had to employ us to go into Court and to combat claims that would have reduced their share in the estate of Christina Buchholz, and their receipts very, very much.

This \$36,000 item, this \$2,700, approximately, item, which was a balance for funeral expenses for a son that had died several months before, and all these other things that we had to dig into.

In addition to that, we have not been able to get Mr. Doherty to ever take a stand.

(The witness left the stand.)

138 Mr. Quinn. I am not questioning Mr. Doherty's honesty. I don't speak of that fund in the sense that he has taken the money out. But it is not earmarked. We cannot find it. You could not intelligently say whether to accept the account or not.

The Court. I understand that.

Mr. Quinn. But on the other matter I don't mince words a bit. I say that he was in a conflicting position, his attention was called to it at the very beginning, and he should not put himself in a position of judging between conflicting claims and attempting to act upon them.

Here we had a situation where it was supposed to pay \$36,000 to one estate out of the estate that our clients are interested in. Twice we have battled that contention out with the bank and with him, and two Judges have sustained us.

We have a claim. Now, here is a situation with reference to another claim. We filed a suit in here for \$119,000 and if the suit is not baseless, that it is one that should have been brought to Court by somebody, is shown by the fact that Fred Buchholz at a certain time before his death had his mother transfer to him very valuable property over in Virginia which the Government finally took, and out of which they realized \$119,000; transferred it into his name, and his mother and himself entered into an agreement, and then to establish that agreement forever, 139 supposedly to be forever, Fred Buchholz had the attorneys—it was Mr. Peelle's office at that time—had him draw a codicil to his will at that time in which this concise agreement stated that it should revert to his mother when he died and not go to his heirs, and in order to carry out the purpose and agreement entered into on the very first day, which was recited in the codicil, the day on which she signed the deed, he was making this codicil to his will.

When you have a situation like that, that case ought to be brought into Court. They may say there was a new deal afterwards, after it was sold, and Fred got the money, but our proof is pretty strong that it was not, and so we had to just take and make him a defendant in this case and take some action in order to realize it.

The Court. I will say categorically with reference to your stricture, to counsel or any other individual acting as executor in two estates, no matter how confidential or how intimate the relation between counsel and the respective decedents was, that it lends itself to difficulties, and I should be extremely reluctant, I know, if I were in the situation, to act in that type of dual capacity.

Mr. Doherty. May I answer that?

I would, too, if the National Metropolitan Bank had not been in there, and where there was any question at all it was left entirely to them and to their attorneys, 140 and all these things that are being said here now are baseless. I know, because I have been with these people and I know about it.

The Court. Mr. Doherty, I don't want you to draw the conclusion that I am concluding that there is anything unethical in your conduct.

I think Mr. Quinn and Mr. Edrington both said, for the record, and for public consumption, if that is necessary, that there is nothing dishonest or anything in the nature of malfeasance in your representation of the estates of both of these individuals.

But I still repeat what I said, that it is an anomalous situation, and it lends itself to difficulties, and the proof of that is the fact of this proceeding here.

Mr. Doherty. We would have had this anyway, your Honor.

The Court. Maybe you would, but in any event, you would not be in the middle of it, where you are now.

Let me say this, gentlemen: I am going to ask you to remain here. I want you gentlemen to come to the bench, please.

(Counsel for both sides approached the bench and conferred with the Court, in a low tone of voice, as follows:)

The Court. I am going to ask you to stipulate that your auditor make a report on the amount of money.

I recommend to you that the case ought to be adjusted.

141 Mr. Edrington. How can it be adjusted?

Mr. Quinn. The National Metropolitan Bank is still prosecuting an appeal from that \$36,000 claim. Mr. Doherty also took an appeal from Judge Holtzoff's action, in sustaining exceptions.

The Court. I am assuming that if the case is compromised, all the appeals fall by the wayside.

Mr. Doherty. There is no way of settling those things like that \$119,000 claim.

Mr. Quinn. That is the same thing Mr. Doherty said about this \$36,000.

The Court. Then I take it that nothing can be done.

Mr. Edrington. I am afraid not, sir.

The Court. I am in this thing and I will decide it one way or the other, then.

Mr. Edrington. We would like to make a proof from our auditor as to what he found in the books.

Mr. Doherty. Why don't you give a copy of the audit?

Mr. Edrington. Will you accept a copy of the audit as the testimony of the auditor?

Can we swear the auditor in and have him swear that copies of these audits are true?

The Court. If he agrees to that.

Mr. Doherty. I would like to submit it to my auditor and let them see where it is wrong.

142 If your Honor please, I would like to have McGinley & McGinley start and bring both accounts together. It will run into about a couple of thousand dollars, but I think it ought to be done.

Mr. Quinn. You ought to stand the expense of that, then.

Mr. Doherty. No. I will file a motion for an order of the Court on that.

Mr. Edrington. Here are the audits, if your Honor please.

The Court. You give him a copy of this and let him take it up with his auditors, McGinley & McGinley, and perhaps there is no great difference except those certain disputed items, and then let me know what the disputed items are and I will take evidence as to the disputed items.

Mr. Edrington. All right.

The Court. That will save a lot of trouble and expense in going over this whole business.

Mr. Doherty. Now, you have given me the copy.

Mr. Edrington. We have another report as to his account which also resolves certain disputes.

These are the exceptions by the auditors to the account.

The Court. Let him have this and let the auditors get together and let the lawyers keep away.

Mr. Quinn. What was that you gave him?

Mr. Edrington. That is the audit of the business.

Mr. Quinn. Who made that up?

143 Mr. Edrington. Frazer and Torpett.

The Court. These are the audits of the account?

Mr. Edrington. Yes, and points out what is not accounted for.

The Court. Well, give him this copy here and then let them sit down and probably some of these items will be reflected out and there will be no difficulty and there will only be certain items left. You see?

Mr. Quinn. And then they can be turned over to the Judge after that.

The Court. That is right.

I am going to assume that all depositions are in evidence, and everything else here. And the reporter is going to give me a copy of the transcript.

Mr. Edrington. That is right, your Honor.

The Court. So I will hold the matter in abeyance until sufficient time as the two auditors come out with a report with reference to the situation in general.

Mr. Edrington. This is also offered in evidence, and that is the rebate slip.

The Court. That is in evidence. I will put that in here, in the file.

Mr. Edrington. All right, sir.

The Court. If it should become necessary to take more testimony, or the auditors to testify, or any-
144 thing in the nature of further evidence, I will let the parties know after I receive these reports.

Mr. Edrington. All right, your Honor.

* * * *

147

Washington, D. C.
Wednesday April 2, 1947.

* * * *

148

Proceedings

The Deputy Clerk. In re the estate of Christina Buchholz, deceased, Administration No. 64,692.

* * * *

Mr. Edrington. * * *

Your Honor remembers when we had the first hearing in this matter it was the suggestion of the Court that we try to reconcile some of these differences by audits and by examination of accounts, so when we came back the matter would be simplified, and in the hope that we might get together.

We have had our auditor examine the executors' accounts, and he has made a report of that audit. He has conferred with the executor, the auditor, and respective cash on hand, profit made from the business, there seems to be no difference between the auditors.

The Court. (Interposing) A little or no difference?

Mr. Edrington. The main difference is this: that the account as stated claims a commission based upon disbursements. Our auditor has found the executor has made disbursements considerably lower than what he found in his account.

The Court. How much lower? How much is the executor's account?

149 Mr. Edrington. About three hundred thousand as against two hundred and twenty-seven thousand—almost one hundred thousand more of disbursements than the account has. In order to show how that was brought

about, for instance, he states in his account he received from the bank some forty-four thousand dollars when he became executor. The truth is he didn't get forty-four thousand because the bank had reached into the account, as Your Honor remembers, had reached into the account and taken twenty-four thousand, so he only got nineteen thousand. He got cash from the settlement of real estate sales of so many thousands. He didn't pay the mortgage and expenses in settlement. He only got fifty thousand in the transaction and he actually only got twenty thousand that went into his account as executor, which was the matter of the value of the property. He carries in his account the full value and asks in his account thirty-three thousand—his receipts are grossly over-stated and his disbursements are over-stated.

Without a hearing in this case it is difficult to fix the fee. Now, if the executor is entitled to disbursements on the inventory that is another matter. He has pitched his case here and asked for a fee fixed on his disbursements. His disbursements do not amount to anything like he says they are.

The Court. Is that the only item of interest?

Mr. Edrington. No, Your Honor.

The Court. The big objection, of course, is the fee?

150 Mr. Edrington. Yes.

The Court. Is there any other difference?

Mr. Edrington. Also important—

The Court. Items of substance, are they?

Mr. Edrington. I think they are.

The Court. For instance,—

Mr. Edrington. For instance, we say this: we only discovered since we made the last audit Mr. Doherty

reached into his account without the residuary legatee knowing anything about it. If he had asked our permission, we would not be here complaining, by \$20,102.50, and put that into his pocket on account of fees to become due him later.

* * * *

Another thing, we found there isn't \$10,000 in U. S. bonds while he had a separate account as executor, and he took that cash with the interest and never deposited it in his executor's account or any account. We didn't know what happened or became of it until we found that was on account of credit for fees.

The Court. Do I understand this as \$10,000 over and above the \$20,000?

Mr. Edrington. No. He first took out one for four, one for five, and one for one, which made \$10,000. Then
151 he took that and put in his personal bank account.

I say that is very irregular and he has got no right to it. We don't like it. We don't know whether the Court likes it.

Suppose this executor dies, suppose something happens to him, suppose the accounts are not right in the end. We might have to go to the trouble of calling upon his bondsman to sue the estate.

Mr. Doherty. I think we should hear testimony, if you know.

The Court. You don't mind if I take time to examine this?

Mr. Doherty. No.

Mr. Edrington. He doesn't put this \$20,000 in fees in his account. He doesn't say anything about it at all.

What he is apparently doing is taking a chance if the Court will allow him the \$33,000 in fees here, he will then credit that sum with the \$20,000 he has already taken.

One particular item in the account amounting to the sum of \$4,000, which he claims he paid out for repairs to the business buildings. We say he did not pay that amount out, he paid out gross receipts of the business. That is a duplication.

That is one of the serious items.

Now, with reference to the second account, he charged himself with having \$147,308.61.

152 The Court. Restated?

Mr. Edrington. No, the second account. The restated account was filed after we had that hearing in court.

He understated his cash at that time 147,000 by 18,309. When the auditor's report got to me, I went to see Miss Brown, in the Register of Wills's office, and I was surprised to find he had overstated in his account, had overstated his cash. I called upon him to correct that if he had not been called on, we would not have had the auditor to find he had misstated it by \$18,000.

The Court. \$18,000?

Mr. Edrington. \$147,000, when it should have been \$165,000. He has in his personal account \$1,040. Nowhere in the account do we find that stated. We find it when we make the audit. That is the only time we find it.

This is a small matter, but the auditor calls attention that he received a bill for funeral expenses of Mrs. Buchholz for \$3,530, which he could have paid, he had the cash in hand, and could have taken a discount of \$67.80. That was simply an oversight on his part, but there is the sum of \$67.80 as the final result which could have been saved.

Now, he is claiming \$337,492 instead of \$227,209, a difference of \$100,000. If he states, as he does, the executor would get the sum of \$10,000, even though he is allowed some 10 per cent commission which I say he is not
153 entitled to, in view of all he says. He is getting the sum of \$10,000 more than he is really entitled to. If

we had not come in here and brought these accounts to the attention of the Court—those things we can't reconcile.

The Court. Let me see, by way of recapitulation: first of all, there is cash on hand from the business and you make no specific complaint about that.

Mr. Edrington. Your Honor, he stated \$18,000 when we find \$23,000.

The Court. I understood that, but you make no complaint about that?

Mr. Edrington. He misstated in the account when it should have been \$23,000.

The Court. The point is that the administrator advanced himself \$23,000 and sold bonds to make up \$20,000 of that amount.

Also you say, he reported repairs to the building, which is a duplication.

Mr. Edrington. Yes, sir.

The Court. You say the cash on hand should have been reported \$165,000 and he only reported it as \$147,000.

Mr. Edrington. Right, and we only found out this—

The Court. (Interposing) And he should have taken a discount of \$67.80 from the funeral bill and a commission of 6 per cent, in the neighborhood of \$10,000,
154 instead of in the amount of \$23,000?

Mr. Doherty. I met Mr. Edrington on two or three occasions. He said, "Your fees are going to run into certain amounts, I suppose you want to put them over a certain period of time."

I said I was doing it, I have a right anyway, and he said, "We have no objection."

Under Title 20, Section 610, of the Code of the District of Columbia, the executor or administrator is permitted

to retain out of any funds in his hands the amount of money he is entitled to as executor or administrator.

That is done and the thing you will find they object to, as far as the Register's Office is concerned——

The Court. (Interposing) This Statute states: (Reading) "Shall be retained out of such commissions as the Court shall allow, not to exceed 10 per cent."

Mr. Doherty. I can do it——

The Court. Mr. Doherty, he is not raising the point. The only point now he is raising, you say the Statute says, "shall retain out of the account such money as the Court shall allow."

You presumably assumed the Court would allow \$20,000.

Mr. Doherty. No, I thought I was entitled to \$20,000.

The Court. On the theory you would be allowed \$20,000 and retained \$20,000.

155 Mr. Doherty. Your Honor, I felt from the business, I have charged myself in that restated second account with the sum of \$23,000 as profits which have been filed in accordance with the reports in the Register of Wills Office.

Out of that \$23,000 profit, I only have, and I have shown \$18,000, the third page, the restated second account, \$18,041.14.

The actual amount of cash I have received, which I state, \$10,000 in one account.

They have gone all through the figures and you can see not one penny was taken out of the hotel account until the business was sold.

The difference between \$18,041.14 cash in the business and the \$23,000. Approximately \$1,135 is uncollected in bad accounts, and the other amount of money you will find was used for the purpose for paying for improvements for certain amounts spent for articles which were sold to the people who purchased the hotel.

In the inventory, this \$18,041 is actual cash received from that business, and I accounted for it here. (Indicating)

Does Your Honor follow me on that? There was \$18,309 carried in the first account, with which I have not charged myself. That was the balance of the profits as of November, 1946.

Then I pick up the other in the restated account
156 and charged—

The Court. (Referring to account.) A loss for November, 1946—cash received from the operation of the business.

Mr. Doherty. Right.

The Court. You are raising this point in answer to the point raised by counsel.

Mr. Doherty. That I have not shown the profits from the business, the \$10,000 in the August account nor shown accounts receivable.

Now, the accounts receivable and the amount of money that was advanced for insurance and the thirty-one hundred for petty cash make up this \$18,000.

The Court. How about duplication in building repairs?

Mr. Doherty. I say there is no duplication. That is actual cash and I have it here. (Indicating.)

The Court. Let me interrupt.

Mr. Edrington. Where, in this account, the second restated account you—

The Court. Yes.

* * * *

Mr. Doherty. That forty-five includes \$1,135 of uncollected accounts which went into accounts receivable.

Let me start with this.

157 The Court. Let's finish this while it is fresh in my mind.

I am asking counsel to indicate to me where, in this account, there is a duplication with respect to the item of repairs to the building.

Counsel now says its answer to that inquiry, on page 3 on the restated second account, in an item calling for disbursement there is \$4,355.69.

Mr. Doherty. Right.

The Court. Which is explained as additional expenses for purchasing equipment and improvements.

Mr. Doherty. I thought we would have a final settlement after this particular thing, the \$11,000 and so forth, bad debts—

The Court. * * * You have an item of additional expense for purchase of equipment and improvements. That disbursement is \$4,535.69.

I thought in your answer that this is a duplicate item for repairs. You say \$1,135 of that represents bad bills.

Mr. Doherty. Yes.

The Court. I don't follow you.

Mr. Doherty. Technically, perhaps that is not true. Take \$1,135 off that, you have \$3,400.

The Court. It should be \$1,135 off that amount.

Mr. Doherty. Shouldn't be off that. Put it in another.

158 The Court. You mean it goes in the account but certainly should not go in under "improvements"?

Mr. Doherty. Yes, put it under bad debts.

The Court. That explains that item.

Mr. Edrington. I don't know whether it does or not—bad debts. It is not reported anywhere in that account as bad debts. If it was bad debts the simplest thing for Mr.

Doherty to do would be to turn this over to the legatees and say he can't collect them.

The Court. I don't care what is done with that.

Mr. Edrington. My auditor tells me that is not true. It is included in that \$4,000.

The Court. Mr. Doherty says it is not in there. Mr. Doherty said that in the item as restated, the \$4,535.69 item represents \$1,135 in bad debts, so that would bring that item down \$3,400 and some odd dollars.

Mr. Edrington. All right, sir, \$3,400 is a duplication.

Let's assume he is right. I am willing to take his word. If that \$1,135 is out of that what does become of that?

The Court. He says it is additional money for improvements.

Mr. Edrington. You say——

The Court. (Interposing) No, I don't at all. Are you raising an objection to the whole amount?

Mr. Edrington. No, I say that is not true.

159 Mr. Doherty. It is a play on words. I should have \$23,000 in cash. They know I don't have that amount of money.

The Court. They say that item there is not a proper item. I don't know. I have not examined the books, and I don't know.

Now, how about this funeral bill?

Mr. Doherty. The funeral bill was some time before I had any money and in position to pay it, and since——

The Court. Your answer is no—you had no money to pay it?

Mr. Doherty. That is one of the first things when I got the money.

The Court. \$37,400 which was disbursed, you claim should be only twenty-seven thousand some odd dollars?

Mr. Doherty. I filed my account in accordance with the rules of the Probate Court which permits me if I sell a piece of property for \$60,000 and there is a \$20,000 trust on there to straighten out by the title company, that \$60,000 in my hands, they are my agents; and when they pay out \$20,000 it is just like a disbursement from my office.

The Court. Was that property sold?

Mr. Doherty. For \$60,000.

The Court. And a trust was on it?

Mr. Doherty. For \$20,000.

The Court. So when you received, when the ad-
160 justment was made at the title company, the \$60,000 was paid, \$20,000 of that was allotted by the title company to the holder of the first trust?

Mr. Doherty. Right.

The Court. You say that is a disbursement you should have been credited with?

Mr. Doherty. Taxes and all those other items.

The Court. Why not?

Mr. Edrington. As I understand disbursements, if that is true, carried out, would be the situation where if I had a million dollar estate with \$950,000 worth of debts, the executor would come in here and say he wanted 10 per cent of a million dollars and he would get all the money left.

The Court. That is not the point. It may be the ultimate result. The point is, whose disbursement is it at the time the disbursement was made.

Mr. Edrington. I say it was not the executor's disbursement.

The Court. Then if not the executor's, it is somebody's disbursement; correct?

Mr. Edrington. In the final settlement he gets the net coming to him. It is like selling bonds, the broker selling it. You don't ordinarily pay anything on that. You get the net profits of the bonds.

The Court. I don't follow you there. It is
161 \$20,000, we will assume. That is the amount here.

Mr. Edrington. No.

The Court. This \$20,000 is paid either in cash or as a credit to someone.

Mr. Edrington. Right.

The Court. And that somebody is the holder of the first trust.

Mr. Edrington. Yes.

The Court. Correct?

Now, somebody pays that. Certainly the title company is not handing out largess on their own.

Mr. Edrington. Right.

The Court. So somebody's credit is being allotted or being paid over or credited to the holder of the first trust.

My question is whose money; whose credit; whose cash is it?

Mr. Edrington. I say it never came into the hands——

The Court. That is not the point. Whose is it?

Mr. Edrington. It may be in the title company five minutes.

The Court. Suppose we ask this auditor.

Mr. Edrington. Yes.

The Court. Whose cash is it?

Mr. McGinley. Cash is cash.

The Court. Whose credit is it?

162 Mr. McGinley. The money was never disbursed by the executor.

The Court. My point is who gets the credit for the allotment of the payment?

Mr. Doherty. The statements will show.

The Court. I am asking—let's forget this cash for the moment. Let's take a proposition that a house is being sold. The house is valued at, say, \$10,000 and there is a \$7,000 trust on it.

Say you go to the title company and the party buying the house assumes the \$7,000 obligation, correct?

He pays \$3,000 in cash. Now, who gets the credit for the discharge of the original obligation, the \$7,000; who gets the credit for the \$7,000?

There is only one answer.

Mr. Edrington. Right. But are we talking about disbursements or credit. It is an entirely different thing.

The Court. We are talking about a payment, strictly speaking, which this executor claims he was entitled to claim as disbursement even though he never had the cash in his hand.

Well, all right.

Mr. Doherty. Definitely, that is in accordance with the rules of the Probate Office for years.

The Court. I am not interested in rules; I am interested in the factual approach as to that particular problem.

163 Next?

Mr. Edrington. On this eighteen thousand.

The Court. How about \$227,377.

That accounts for the twenty thousand.

Mr. Doherty. He is adding that \$20,000 note paid in the bank, which we went into on the stand the last time.

Mrs. Buchholz died the 15th day of January, 1945. On the 28th day of June, 1945, this note was paid, and it was filed in the original account.

I had credited my original inventory—

Mr. Edrington. (Interposing) Forty-four thousand in debts.

Mr. Doherty. Which was in the National Metropolitan at the time of the death of Mrs. Buchholz, which I had to take over the minute she died as executor.

The Court. I don't want you to go too fast. I am talking about the \$20,000.

Mr. Doherty. Yes, sir.

The Court. How do you jump to forty-four thousand?

Mr. Doherty. That was \$44,000 which was put in the inventory of money in debts.

The Court. Nineteen thousand in notes and twenty thousand in cash (referring to document).

Mr. Doherty. Twenty thousand cash turned over to the Occidental Hotel.

164 The Court. That accounts for sixty-four thousand.

Mr. Edrington. No, that is not right. When Mrs. Buchholz died, before he got any funds out there was \$44,000 leaving \$19,000 credit to the estate when Mr. Doherty qualified. When he qualified he only got \$19,000.

The Court. What I am trying to show Mr. Doherty has explained—I don't say explained from the standpoint of my satisfaction—but Mr. Doherty has made an explanation with reference to the \$20,000 item.

Mr. Edrington. No, it is a \$25,000 item.

The Court. I am talking about the sale of the real estate.

Mr. Edrington. That is fictitious.

The Court. Your contention is it is fictitious. It is a very real item. But my purpose is to account for the difference between the three hundred and thirty-seven thousand and the two hundred and twenty-seven dollars. He says one is the \$20,000 item.

Mr. Edrington. A number of pieces of real estate make up that item.

Mr. Doherty. All I set forth——

The Court. (Interposing) How much did he get of these disbursements which he claimed is the result of the sale of the real estate? Roughly.

Mr. Doherty. Until the difference between the
165 \$227,000 which they say——

The Court. The difference is \$100,000.

Mr. Edrington. Right.

The Court. Approximately. You have counted for \$20,000 and the \$19,000 note.

Mr. Doherty. Right—on the third page of the first account.

The Court. I haven't got that.

Mr. Doherty. I have set forth all those items and they were checked off by the Register's—the Register Wills' office as disbursements.

The Court. What do they take you to task about?

Mr. Doherty. Nothing. I don't see anything at all. I have turned over all the books. There is no question I have all the cash except the \$20,000 taken out, and which I have stated why I did it. They checked my bank account, at the hotel, Mr. McGinley's office, everything in my file, so they could see it.

The real main contention, as I gather, is the fact of the \$3,100; that that is part of the profits of the business, and of course Mr. McGinley here (indicating), he has checked and double-checked on these figures; so everything is proper.

The Court. Mr. Edrington, as I see it, the problem is this: first of all to determine as a matter of law these items, particularly the items with reference to dis-
166 bursements in the matter of discharge of trusts on real estate are properly disbursements of executor.

Mr. Doherty. The question of law involved—

The Court. He admits he has made the charge in that fashion.

Mr. Edrington. Right.

The Court. The next question to determine is the question of fact with reference to the funeral bill—the \$67.80 item. I don't think you make a great point of that.

Mr. Edrington. No, I am just calling it to Your Honor's attention.

The Court. As part of the general picture. In addition to that, there is the question of the advancement of fees of \$20,000. That is a question of law under the Statute.

Mr. Edrington. I think it is.

The Court. Then, that leaves, as I see it, only this item

of additional expense, \$4,435.59. Have you submitted any vouchers indicating actually either expense and equipment?

Mr. Doherty. No. You see they have all the vouchers. I didn't pay that out.

The Court. You are taking credit for that, charging it as a disbursement?

Mr. Doherty. The way I charged myself in this account with \$23,000 in round figures as the profit from the business. Now, in the profits from the business that
167 included accounts receivable and all these other things—\$1,135.00 of accounts receivable not collected, and I am going to turn that over to the residuary legatees when I make the final account and will then do what they want.

The other was signed checks for every disbursement and some part of that three thousand odd dollars is in the inventory I got. We got the seven hundred thousand, which I signed and paid out weeks and months ago while I was in the hotel. Mr. McGinley here will state that was disbursed, did not come into the hotel, and part of the profits which did not go into the inventory.

The Court. That is the only item left, isn't it, Mr. Edrington?

Mr. Edrington. I don't know, if Your Honor please. I would like to offer some evidence here that my auditor has.

The Court. On what?

Mr. Edrington. On what the auditor found.

The Court. To what items?

Mr. Edrington. All of these items, if the Court please.

The Court. I don't want to hear with respect to advancement of fees, as a matter of law. I don't want to

hear any evidence unless there is a controversial issue of facts. The only item that is left, as I see it, is the item of \$4,435.59, additional expense for the purchase of equipment and improvements.

168 Mr. Edrington. Suppose Your Honor comes to the conclusion he has no right to fees on what he paid but on actual disbursement by checks? Your Honor hasn't got the figures on which he based a fee. I would like to show by the audit by the auditor what he found by actual deposit in bank and actual checks against that, which would give Your Honor the actual disbursements if Mr. Doherty is willing to take the figures and save the trouble of putting on the testimony, all right.

The Court. Possibly you could get together and agree on what items you could agree on and which items are left on which you could not agree and as to which there is controversy, and as to which evidence could be taken.

Have you agreed on anything?

Mr. Edrington. If he will say the \$227,109.09, which does not include the \$10,000 disbursement to the executor for the sale of these bonds which are not in his bank account——

The Court. Credits on the Riggs——

Mr. Doherty. (Interposing) I think that is about right. I don't want to question that figure. It is about right, \$227,000.

Mr. Edrington. It is shown by his checkbook. His checkbook shows some \$338,651.95, the difference between those two items is what he has given as the balance due the legatees——

169 Mr. Doherty. About three dollars difference when it is added up.

The Court. You actually received \$338,000 in checks?

Mr. Doherty. In the amount of money I received.

Mr. Edrington. \$338,651.95. Let's put these figures down then. They actually received in the course of the administration from the sale of all property \$338,651.95—during the course of his administration from his executor account, leaving out the personal account, the executor disbursed a total of \$227,105.09. He should have in cash at this time \$111,542.86 before payment of any fee.

Mr. Doherty. As for the year \$111,539.86, which is about two dollars difference.

Mr. Edrington. \$111,542.86 before disbursement of any fee. However, \$20,122.50 less than that.

The Court. Represents what he took out?

Mr. Edrington. Now, as against that, he contends he has disbursed \$3,381.00.

The Court. With reference to the particular item he has now expended, is there a question of law?

Mr. Edrington. I think it is a question of law. We have got evidence that the bank paid that note after—

Mr. Doherty. On the 27th or 28th of January.

The Court. In any event, what is the point?

Mr. Edrington. Before he had qualified the bank
170 had paid itself this money and \$2,500.00 on 10 per cent.

The Court. I understand that.

Mr. Edrington. I would like to offer evidence here of these proceedings where we were forced to bring suits against this executor for his failure to do his duty. I think it is part of this case, Your Honor.

The Court. You may put this in and that is also a question of law.

Mr. Edrington. I want to call the Court's attention at this time that at the time of trying this case the last time the Court of Appeals had not decided these controversial matters. Since then, the executor took an appeal from the order of Judge Holtzoff's sustaining exceptions to the account where it knocked out a \$36,000 item which they were trying to pay Fred Buchholz's estate. We objected. He took an appeal to the Court of Appeals and the Court of Appeals dismissed the appeal. Then the bank as co-executor brought suit, and I would like to offer in evidence the record of that case.

The Court. This has to do with this \$25,000 item?

Mr. Edrington. No, his general attitude in this matter, which we complained about in our exceptions.

The Court. You are offering that?

Mr. Edrington. I would like to make the record complete.

This is entitled The National Metropolitan Bank of Washington, a corporation, co-executor of the estate
171 of Frederick W. Buchholz, deceased, Appellant vs. Cornelius H. Doherty, as executor of the Estate of Christina Buchholz, deceased, Appellee, in which the motion to dismiss was filed by the residuary legatees and sustained.

Mr. Doherty. Would you mind saying at this time you answered by letter—

Mr. Edrington. (Interposing) Yes, because I thought he was not going to represent us properly. We were quite worried about the situation.

Mr. Doherty. Sure.

Mr. Edrington. This is a printed copy of the Court of

Appeals decision, and the order, number 9274, District Court Administration number 64,692. That was the civil action in which the decision of Judge Bailey was affirmed, which settled forever the claim of \$26,000.

Certified judgment of the Court of Appeals decided November 23, 1946, the case of Cornelius H. Doherty, executor of the Estate of Christina Buchholz, deceased. This is with reference to Judge Holtzoff's order as to the first account.

We also wish to offer in evidence civil action number 31,024, a suit entitled Louis Stoner, et al, residuary legatees, a suit to bring out the question of title to the lease on the building of the business. Mr. Doherty refused to recognize the estate as having a title to that real estate.

172 Copy of letter by Mr. Quinn to Cornelius Doherty dated April 10, 1945, on which he is called upon to either withdraw as executor from one of the other estates.

Also answer dated April 18, 1945, in which he states he has no intention of resigning in either estate.

I also offer copy of letter from Mr. Quinn to Mr. Doherty dated June 12, 1945, which has to do with the lease of the property.

That gives Your Honor an idea from these records the expense to which these people were put to due to the fact that Mr. Doherty represented an adverse interest, and showing that he was carrying water on both shoulders.

I would also like to offer in evidence in the suits wherein the residuary legatees were required to bring a suit for \$119,000 against the estate of Frederick Buchholz growing out of an agreement between the mother and son, which matter is still in abeyance and not decided yet. I will have to supply the reporter the number of that. I will have to supply the number of that record.

The Court. Is that all?

I would like the reporter to furnish me a transcript of the proceedings this morning.

Mr. Edrington. Oh, yes.

The Court. Very well.

Mr. Edrington. I also want to call the attention
173 of the Court to this also. You will remember Mr.

Doherty testified when we put him on the stand and questioned him, he was shown an item in the amount of two hundred and some odd dollars, and he admitted he had charged that off. I don't know whether the record is clear on that item that was charged off, but I think there ought to be some admission here with respect to advertising and various accounts.

Mr. Doherty. We do it down there. Isn't it right, Mr. McGinley, offer to make that good? Have you done so? I tried to explain why we did it, I was working there.

The Court. Two hundred dollars for meals (examining record). It is in the record.

Mr. Edrington. Yes, it is in the record.

Mr. Doherty. It is in the record.

The Court. This is in evidence in the case.

Then, does that conclude this hearing?

Mr. Edrington. Yes, Your Honor.

No. 9594

BRIEF FOR APPELLANT

United States Court of Appeals

DISTRICT OF COLUMBIA

CORNELIUS H. DOHERTY, Executor of the Estate of
Christina Buchholz, Deceased, *Appellant*,

v.

LOUISE STONER, GUSTAV F. BLANK and WILHELMINA
MERKLE, Committee of FREDERICK W. MERKLE,
Appellees.

Appeal from the District Court of the United States
for the District of Columbia

United States Court of Appeals
for the District of Columbia

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James W. Stoner
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CORNELIUS H. DOHERTY,
1010 Vermont Ave. N.W.
Washington, D. C.
Attorney for Appellant.

INDEX

	PAGE
Jurisdictional Statement	1
Statement of the Case	2
Statutes Involved	5
Statement of Points	6
Summary of Argument	6
Argument	7
Conclusion	14

CASES CITED

Beard vs. Beard, 140 N. Y. 260, 35 N. E. 488	13
Estate of Anton W. Klein, Administration No. 22306..	9
Estate of Orren G. Staples, Administration No. 25061	9
Washington Loan and Trust Company vs. Convention of Protestant Episcopal Church of the Diocese of Washington, et al, 54 App. D. C. 14	9
York vs. The Maryland Trust Company, 150 Md. 354, 133 Atl. 128	10

STATUTES CITED

Title 20, Section 605, D. C. Code, 1940	5
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BOOK REFERENCE

Mersch, on Probate Court Practice in the District of Columbia	9
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United States Court of Appeals

DISTRICT OF COLUMBIA

No. 9694

CORNELIUS H. DOHERTY, Executor of the Estate of
Christina Buchholz, Deceased, *Appellant*,

v.

LOUISE STONER, GUSTAV F. BLANK and WILHELMINA
MERKLE, Committee of FREDERICK W. MERKLE,
Appellees.

Appeal from the District Court of the United States
for the District of Columbia

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

This is an appeal by Cornelius H. Doherty, Executor of the estate of Christina Buchholz, deceased, from the action of the District Court of the United States for the District of Columbia in sustaining exceptions to his second restated account as Executor.

The District Court has jurisdiction under Title II, Section 306, D. C. Code, 1940.

This Court has jurisdiction under Title 17, Section 101, D. C. Code, 1940.

STATEMENT OF THE CASE

On January 15, 1945, Christina Buchholz departed this life in the District of Columbia and on the 1st day of February, 1945, letters testamentary on her estate were granted to Cornelius H. Doherty, who was named as Executor in her Will.

The pertinent parts of her Will necessary for a disposition of the appeal are as follows: (App. 2-4).

ITEM I: I direct my Executor, hereinafter named, to pay all of my just debts and the expenses of my last illness, funeral and burial in such amounts as he may deem proper, as soon after my death as may be practicable.

ITEM XV: All of the rest, residue and remainder of my property and estate, both real and personal, of whatever kind and wheresoever situate or located, of which I may die seized or possessed or to which I may be in any wise entitled at the time of my death, I direct my Executor, in his discretion, to reduce to cash and divide it equally among the following: Louise Stoner, Gustav Blank and Fred Merkle, the issue, however, if any, surviving at my death, of any of the foregoing who may predecease me, to take, *per stirpes*, the same part or share that the deceased ancestor would have taken if surviving me.

ITEM XVI: I hereby name, constitute and appoint Cornelius H. Doherty, an attorney of the District of Columbia, to be the Executor of this my last will and testament, and I request that no bond or undertaking be required of him, either in this or in any other jurisdiction wherein he may deem it necessary or advisable to qualify, and that he be allowed the maximum compensation permitted by law.

I hereby give to my Executor full power and discretion in the management and control of my estate, with the right and power to sell all, or any portion thereof, which he may deem necessary or advisable for the payment of my just debts, the settlement of my estate, or in the best interests of my estate; and no purchaser from my Executor shall be under any obligation to see to the application of the purchase money.

In the second restated account of Cornelius H. Doherty, as Executor of the estate of Christina Buchholz, (App. 43-46) credit for Executor's commissions of ten per cent was claimed in his account on the disbursements and distributions set forth in the first account (App. 5-19) and in the second restated account of \$337,492.69, which commission totalled \$33,749.26. The inventory of the estate, at that time, was \$405,609.99. This inventory consisted in part of the sum of \$208,412.53 covering the sale of real estate belonging to the decedent, which was sold by the Executor in accordance with the Will of the decedent under an order of Court. The order of Court contained the statement that the Executor was authorized and directed to convey the property free of all liens.

Settlement on the sale of the property was had through the District Title Insurance Company. The District Title Insurance Company made all adjustments, which included the payment of trusts on the property, adjustment of taxes to date of sale, payment of commissions to real estate brokers, interest payments on the trusts and including title charges, totalling \$66,202.05. This amount was deducted by the Title Company and the balance of the sale price paid by the District Title Insurance Company to the Executor.

In the first account of the Executor, which was approved by the Court, the total amount received for the sale of the property, under the order of Court, was set out in the account as a part of the inventory of the estate and

the amounts distributed by the Title Company were specifically set forth in the account and were taken as credits by the Executor as having been disbursed by him. (App. 5-19).

On November 28, 1944, Christina Buchholz gave a promissory note to the National Metropolitan Bank, wherein sixty days after date she agreed to pay to the bank the sum of \$25,000.00 with interest at five per cent and on the 28th day of January, 1945, the bank, with the knowledge and consent of the Executor, deducted the sum of \$25,166.67 from the amount of cash in the bank and turned the cancelled note over to the Executor. The note was an ordinary promissory note and contained no right to a lien on funds in the possession of the bank nor was there any collateral security given therefor. (App. 94-97).

The Executor carried the amount of the money that was in bank at the time of the decedent's death in his inventory, (App. 6) and in his first account claimed the sum of \$25,166.67 as a disbursement on his part, (App. 13) and in his second restated account included this disbursement as a part of his disbursements upon which he claimed commission.

The Executor advanced to himself partial commissions in the sum of \$20,122.50 without any order of Court, the purpose for the advance to himself being to equalize his income tax over the period of time for administration, and this advance of commissions was known to counsel for the appellees and who stated that he had no objection to such advance. (App. 113). The amount advanced being less than the amount subsequently allowed by the Court.

Exceptions were filed by the residuary legatees to the amount of the commissions claimed by the Executor, it being contended in the exceptions that the Executor was entitled to the ten per cent commission only on the actual cash received and disbursed by him.

The residuary legatees also excepted to the allowance of the ten per cent commission to the Executor on the sum of \$25,166.67, which the bank deducted from the account of Christina Buchholz in its bank to pay the note.

The residuary legatees, in their exceptions, insisted that the Executor had no right to advance himself partial commissions without an order of the Court. (App. 24-31). The residuary legatees at no time raised any question of the Executor's personal integrity but that his actions on these certain points was not in accord with law. (App. 53).

The Court sustained the exceptions of the appellees allowing the Executor commissions only on the actual net cash received by the Executor and disbursed by him, and required the Executor to pay to the estate interest at the rate of 6% on the partial commissions advanced to himself without the order of the Court from the date of the advances to July 1, 1947. (App. 57-58).

STATUTES INVOLVED

The following section of the 1940 District of Columbia Code is involved and pertinent to a decision in this case:

Title 20, Section 605. Disbursements and allowances.

"On the other side shall be stated the disbursements by him made, namely: First. Funeral expenses, to be allowed at the discretion of the court, according to the condition and circumstances of the deceased, not exceeding three hundred dollars: Provided, That for special cause shown the court may make such additional allowance not exceeding three hundred dollars as such special circumstances may warrant. Second. The debts of the deceased proved or passed as herein directed, and paid or retained. Third. The allowance for things lost, or which have perished without the party's fault, which allowance shall be according to the appraisement. Fourth. His commissions, which shall be at the discretion of the court, not under one per centum nor exceeding ten per centum on the

amount of the inventory or inventories, excluding what is lost or perished. Fifth. His allowance for costs, attorneys' fees, and extraordinary expenses which the court may think proper to allow."

STATEMENT OF POINTS

1. The Court erred in holding that the Executor was not entitled to claim commissions on the inventory of the estate whether disbursed by his agent or himself.

2. The Court erred in holding that the amount of money in the bank at the decedent's death was not a part of the inventory of the decedent's estate and that the Executor was not entitled to commissions on any payments from that fund.

3. The Court was in error in holding that it was necessary for the Executor to obtain an order of Court in order to make partial advances of commissions to himself and in charging the Executor six per cent interest on the amounts advanced.

SUMMARY OF ARGUMENT

1. Commissions due the Executor are calculated upon the inventory or inventories of the estate and are not based upon the actual cash disbursements made by the Executor, and the Executor should be allowed the amount claimed in his second restated account.

2. Where the decedent's Will gives to the Executor the maximum compensation permitted by law, the discretion permitted by the Statute, as to the amount, is taken away from the Court and it is not necessary that an application be made to the Court to set aside the amount, and a partial advance of commissions, in accordance with the Will, would be proper and the Executor should not be charged with interest on such partial advances.

ARGUMENT

The joint appendix contains 129 pages, the greater part of which was designated by counsel for the appellees and has no bearing whatever upon the points relied upon on this appeal. The points, upon which the appellant relies, were filed at the time that the appeal was noted and counsel for the appellees received a copy of these points at that time and the lengthy record is apparently for the purpose of beclouding the issues involved on this appeal.

The Will of the decedent allowed the Executor the maximum compensation permitted by law which, in the District of Columbia, is 10% and in the second restated account the Executor claimed credit for partial commissions paid to himself on the disbursements contained in the accounts filed with the Court, which were evidenced by vouchers confirming the payments of these amounts and which were filed in the office of the Probate Court. A part of these disbursements were made through the District Title Company where the settlement of the sales of the real estate were made.

All of the real estate was sold under an order of Court and the property, by virtue of these orders, was sold free and clear of all liens and it was necessary that the Executor account for the sale price of the property and for all disbursements made out of such fund, and while the Executor had sufficient funds to pay the trusts by his own check, or could have made the disbursements himself out of the amount received for the sale of the property, nevertheless, it is the custom in the District of Columbia to permit the Title Company to make such disbursements at the direction of the seller in order to facilitate the proper settlement of the sale and in such a case the Title Company acts as the agent of the seller.

All the accounts filed in this cause were filed in accordance with the approved practice of the Probate Court for

a number of years, and the accounting method used in these accounts was also in accordance with the practice of the Probate Court. It is necessary that the Executor take the estate as of the date of the death of the decedent and file an inventory of money and debts as of that date. The amount of the estate in the name of the decedent, at the date of death, must be accounted for to the Court and for tax purposes.

The item of \$25,166.67, on which the Court refused commission to the Executor, was a part of the amount of money that was in the hands of the National Metropolitan Bank at the time of the death of the decedent on January 15, 1945. On the 28th day of January, 1945, a note of the decedent came due at the bank and the amount of money owed the National Metropolitan Bank was deducted by the bank, with the approval of the Executor, in payment of the note. The Executor could have required the bank to pay over all this money and required it to file a claim in the Probate Court, but it was in his discretion and at his risk to permit the bank to retain this money in payment of the debt of the decedent. In the event that the decedent's estate was not sufficient to pay all of the obligations of the decedent, then that sum of money would have to be collected by the Executor from the bank. It was necessary for the Executor to account to the Court for this sum of money and to show the payment of this obligation and also to include this sum of money for estate tax purposes. The note was filed in the office of the Probate Court as the evidence of the payment of this obligation and this note gave no authority to the bank to withhold any sum of money for the payment of the obligation.

It is contended that the Court was in error in failing to allow commissions to the Executor on all disbursements made by the Title Company and also on the item covering the note in the National Metropolitan Bank.

The question covering the allowance of commissions on disbursements made by a Title Company was before the

District Court on exceptions on two occasions. In the matter of the Estate of Anton W. Klein, Administration No. 22306, and in the matter of the Estate of Orren G. Staples, Administration No. 25061, the exceptions were disallowed and commissions were allowed on the disbursements made through the Title Company, and this appears to be the approved practice of the Probate Court on accounts filed in that Court.

In Mersch, on Probate Court practice in the District of Columbia, at page 305, is the following:

“Section 365; T. 29, Sec. 265, allows a commission of from 1% to 10% on ‘the amount of the inventory or inventories excluding what is lost or perished.’ Such items as (a) profits realized on sale or redemption of principal assets, (b) advances by heirs or legatees to make up a deficiency in cash to pay debts, (c) the proceeds of real estate sold in the probate court, are not in practice made the subject of supplemental inventories. Nevertheless these, (as well as any assets discovered after the original inventories, which should be separately inventoried) are considered proper items in the base, on which commission is claimed, on principal assets, whether inventoried or not!”

This section of the code is the same one referred to in this brief under “Statutes Involved”.

The decedent had the right in her Will to set forth the amount of the commission to be allowed the Executor and the Executor and the legatees were bound by such provision. *Washington Loan and Trust Company v. Convention of Protestant Episcopal Church of the Diocese of Washington, et al*, 54 App. D. C. 14.

If the commissions to be given to the Executor are not calculated upon the inventory, as permitted by the Code, but only on the actual cash disbursements made by the Executor, this would also exclude commissions on property which was distributed in kind to legatees. If it were intended to confine the Executor's commission to actual cash

disbursements, such a statement would have been incorporated in the Statute instead of the words inventory or inventories.

A good part of our probate law was taken from the law of the state of Maryland and our Courts have followed the decisions of that Court on numerous occasions, and it has been the approved practice of the Orphans' Court of the state of Maryland and the Probate Court of the District of Columbia to require the Executors to account for all of the sums of money covering the sale price of the property and allowing commissions upon the disbursements necessarily made, which would include the payment of trusts on the property.

In most cases where the question of the amount of the commissions is left to the Court's discretion, it may take that into consideration in its allowance of the amount which is to be allowed to the Executor, whereas, in this particular case the question of the amount of the Executor's commission is not left to the discretion of the Court, but such discretion has been taken from the Court by the action of the decedent, which she had a right to do.

In the case of *York v. The Maryland Trust Company*, 150 Md. 354, 133 Atlantic, 128, the question was considered whether the Executor was entitled to commission on the entire inventory or whether he was entitled to commissions only on the net value of the estate and this Court states as follows:

"And finally, the orphans' court, in its opinion, says that 'it is the long established practice of this court to approve and ratify inventories where the whole estate is returned regardless of the liens and claims against any or all of its assets and to fix commissions based on the inventory.'

There is nothing in this practice at variance with our statutes, and in fact the provisions requiring the listing of all assets and of all debts would seem to in-

dicating that this is the correct practice, at least so far as assets within the state of Maryland are concerned."

Again the Court in this case, covering the allowance of commissions to Executors or Administrators, made the following statement:

"It should be noted in this connection that our statutes vest a wide discretion in the orphans' court in fixing the amount of the commissions to be allowed executors or administrators, and most if not all of the cases of hardship pictured by the appellant as possibly resulting from the placing of the full value of pledged assets in an inventory where the sums secured by them are almost equal to the value of the assets can be taken care of by regulating the percentage of commission, and this method of handling the matter would seem to have been the intention of the legislature. The purpose of administering estates is to enable all those entitled to it as creditors or beneficiaries to know what it is and to secure their just share of it. The listing of all property, whether pledged or not, in the inventory, and the returning of all debts due the decedent, show the gross value, while the claims passed against the estate show the obligations. The proper disposition of the property and the efficient collection of the debts may have a great deal to do with the final net worth of the estate, and it would seem that those interested should have the right to know how the executor or administrator carries out these duties. The whole matter is carried on under the direction and supervision of the orphans' court, and under the discretion vested in it by the law that court is able, by regulating the amount of commissions, to compensate the executor or administrator in accordance with the skill and fidelity with which the estate has been administered. And as the settlement of an estate which is heavily indebted invariably requires more work and attention than does one which is comparatively free from debt, it would seem to be in every way the part of wisdom to permit the executor or administrator to place in the inventory all the property of the estate which in any way comes under his control, and to receive as commissions such percentage on the

whole estate as the court may, within the discretion given it by the law, deem just."

It is apparent that the foregoing case supports the action of the Executor and that it was necessary for the Executor to account and to make disbursements as before set out in the accounts filed in this cause, and that he is entitled to commission on such disbursements and the fact that the Court cannot use its discretion covering the amount of commissions to be allowed in this case, should not enter into the decision covering this item.

It is contended further that the Court was in error in entering an order requiring the Executor to pay interest on the amounts advanced to himself without an order of Court and which said amounts so advanced were less than the amount actually due the Executor.

The decedent, as she had a right to do, took from the Court its discretion as to what amount should be allowed the Executor as commissions and it was in the form of a bequest, and the only time that the Court would have any say covering this commission would be whether or not it was properly set forth in the account which had to be approved by the Court. The amount of the commission would be 10% on the inventory of the estate.

An Executor or Administrator may make advances on any bequest or legacy to the parties entitled thereto. He may require that the interested parties file a petition and have an order of the Court to protect himself, together with a bond by a proper surety to secure the repayment of this sum if the nature of the estate should require it. He may also, of his own volition, without such petition or bond, pay over such sums as he may deem proper to the persons entitled thereto without any order of Court. In the latter case, in the event that such monies were improperly paid, he would be personally responsible, and so would his undertaking, if such monies could not be collected from the parties to whom it was paid.

The Executor was informed by counsel for the residuary legatees that he would have no objection to such pre-payment and it is submitted that, even without such consent, it was not necessary that an order be obtained.

The Executor has been charged 6% interest on the monies advanced to himself without Court authority. The Court is aware that for the past three or four years it was impossible to obtain more than 1% interest on money at any time and in most cases even then it was necessary that the money be left in certain places for at least six months and there has been no testimony to indicate that the estate has been injured in any way by such advancement to the Executor.

Covering the question of the charge against the Executor for interest, the Court in the case of *Beard v. Beard*, 140 N. Y. 260, 35 N. E. 488, made the following statement:

“The commissions of trustees are to be allowed on the settlement of their accounts, and the general rule is that they cannot be legally taken before. Code, * 2802; 2 Rev. St. 93; *Wheelwright v. Rhoades*, 28 Hun, 57; *Hancox v. Meeker*, 95 N. Y. 528; *In re Mason*, 98 N. Y. 527; *In re Selleck*, 111 N. Y. 284, 19 N. E. 66. There is an exception to the general rule where the trustees settle with the beneficiaries, and pay out the residue of income or of the estate. There they may first deduct and retain their commissions, without waiting for a judicial settlement of their accounts. While, therefore, in this case, the trustees had no legal right to any commissions until they were adjudged and allowed by the decree in this action, they had earned their lawful commissions at the time they took them. They had then rendered the services for which the law allows the commissions. They acted in good faith, honestly believing that they were entitled to take the commissions. It does not appear, and was not found, that by taking these commissions they caused any injury or damage to the estate; and from the situation of the estate, and the nature of their duties, and the character of the business they carried on, an injury or loss to the estate cannot be inferred.

It does not even appear that they made a profit from the funds withdrawn for their commissions. They were held liable for the interest upon the sole ground that they took their commissions prematurely. Under such circumstances, we think it was error to charge them in this equitable accounting with the interest, and for this conclusion the case of *Price v. Holman*, 135 N. Y. 124, 32 N. E. 124, is ample authority. There we held that a trustee is not to pay interest solely for the reason that he deposits the trust moneys indiscriminately with his own, nor because he makes use of them in his own business; that there must be super-added a breach of trust, or neglect or refusal to invest the funds at the time or in the mode which the trust instrument, or the law itself, has pointed out; and we said: 'The law exacts of a trustee fidelity to his trust. If he is guilty of fraud or the mismanagement of the trust fund, or is guilty of a breach of trust, or has used the trust funds for his own purposes, and made a profit therefrom, he may be compelled to pay interest, and in extraordinary cases compound interest, so as to place the cestui que trust in the same situation as if the trustee had faithfully performed his proper duty.' Here all the elements as grounds of liability for interest on the commissions taken are wanting. It was not found, and does not appear, that the trust estate would have gained a dollar if the commissions had not been taken. Our conclusion therefore is that the judgment below should be modified by striking therefrom the charge against the appellants of interest on the commissions allowed to them, and that, as thus modified, it should be affirmed, without costs to either party in this court."

CONCLUSION

It is respectfully submitted that the Court erred in sustaining the exceptions to the second restated account and that this Court should reverse the action of the District Court of the United States for the District of Columbia and remand the cause with directions to allow commissions on all disbursements for the estate, whether made by the

Executor or not, and that the charge against the Executor, for interest at 6% on commissions advanced to himself, be disallowed.

CORNELIUS H. DOHERTY,

1010 Vermont Ave. N.W.
Washington, D. C.

Attorney for Appellant.

No. 9694
BRIEF OF APPELLEES

United States Court of Appeals
DISTRICT OF COLUMBIA

CORNELIUS H. DOHERTY, Executor of the Estate of
Christina Buchholz, deceased

Appellant,

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Appellees.

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Joyce W. Stewart
CLERK

PRENTICE E. EDRINGTON

438 Munsey Bldg.
Washington, D. C.

Attorney for Appellees

INDEX

	PAGE
Summary of Argument on Issues before the Court....	1
I. The decision of the District Court that commissions of 10% to the Executor, in this case, should be based on actual receipts and disbursements is correct	2
II. The court below was correct in holding that appellant, as Executor, was not entitled to commissions on \$25,166.67 which was never delivered to him but which, prior to his appointment and qualification, was taken by a bank in payment of decedent's due note	11
III. The order of the Court below requiring appellant to pay legal interest on \$20,102.50 appropriated in the guise of commissions on account, without order of court, is correct and should be affirmed..	13
Conclusion	16

CASES CITED

Bennett's Estate, 38 N. Y. S. 945	8
Epperson v. Jackson, 83 S. C. 151, 65 S. E. 217	15
Farmers Loan & Trust Co. v. Turner, (1926) 242 N. Y. Sup. 140, 151 N. E. 439	7
Inglehart v. Inglehart, 26 App. D. C. 209, 216-17	5
Marvin's Estate, (Cal.) Myers Probate 163	8
McNulty v. DeSanssure, 41 S. C. 457, 19 S. E. 926	8
Morisey v. Rogers, 120 Ill. App. 37	12
Vogt v. Vogt, 26 App. D. C. 46, 204 U. S. 478	5

	PAGE
Washington Loan & Trust Co. v. Convention of Protestant Episcopal Church, etc., 54 App. D. C. 14....	6
Wycoff v. O'Neil, 72 N. J. Eq. 880, 67 At. 52	15
York v. Maryland Trust Co., 150 Md. 354, 133 At. 128....	4

CASES REFERRED TO IN OPINION BELOW
NOTE CITED IN APPELLEES' BRIEF

Brosnan v. Fox, 1922, 52 App. D. C. 143	App. 55
Brown Estate, Adm. No. 40,601	App. 56
Lenman Estate, Adm. No. 41,501	App. 56
Maloney v. Foundry Methodist Episcopal Church 78 U. S. App. D. C. 263, 139 F. (2d) 388	App. 55

STATUTES REFERRED TO IN OPINION BELOW
NOT CITED IN APPELEES' BRIEF

D. C. Code, 1940 Ed., Sec. 20-605, 610	App. 54
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United States Court of Appeals

DISTRICT OF COLUMBIA

No. 9694

CORNELIUS H. DOHERTY, Executor of the Estate of
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Appellant,

vs.

LOUISE STONER, GUSTAV F. BLANK, and WILHELMINA
MERKLE, Committee for Frederick W. Merkle

Appellees.

Appeal from the District Court of the United States
for the District of Columbia

BRIEF OF APPELLEES

SUMMARY OF ARGUMENT ON ISSUES BEFORE THE COURT

There are here involved the correctness of the provisions of an order of the District Court, Holding a Probate Court, finding and ordering that:

- I. Commissions of ten per cent to appellant, as Executor, be restricted to actual receipts and disbursements;

- II. No commissions be allowed the Executor on the sum of \$25,166.67, representing the principal and interest due on a note of decedent which, prior to the date of the appointment and qualification of the Executor, was taken by a Bank, to whom the note was due, out of decedent's deposits in said bank, with the result that after the Executor qualified, the said bank only paid over to him the net balance to the credit of decedent.
 - III. The Executor had, without previous submission and order of the Court, improperly appropriated to himself out of the funds of the estate the sum of \$20,102.50 on account of ultimate commissions which might become due to him, and ordering the executor to pay legal interest thereon from the date said funds were taken to the date of the order allowing commissions.
-

I. The Decision of the District Court that Commissions of 10% to the Executor, in this Case, Should Be Based upon Actual Receipts and Disbursements, Is Correct, and Should Be Affirmed.

Appellees are the sole residuary legatees under the last will of Christina Buchholz, deceased. Appellant is the sole executor of the will of Christina Buchholz, and contemporaneously, he is also co-executor under the will of Frederick W. Buchholz, son of Christina, who predeceased his mother by 54 calendar days. During their lifetime, mother and son had numerous business transactions with reference to a farm in Virginia, (the subject of a pending suit between the parties to this action) and also in connection with the operation of the well known Occidental Hotel & Restaurant in this City. The mother originally the owner of the Hotel and Restaurant business had transferred it to her son under a contract in writing by which it was agreed and understood that if he predeceased her all of said business would revert to her at his death. This

contract was before this Court for interpretation at the instance of the Executors of the Estate of Fred W. Buchholz as will at length appear in Case No. 9392 of the docket of this Court.

Appellant, an attorney, had served both the mother and son during their lifetime and up to the date of their respective deaths. He had prepared the son's will in which he was named co-executor. After the son's death he drafted a new will for the mother in which he allowed himself to be her sole executor. He was well aware that by reasons of the business transactions between the parties testate conflicts would inevitably arise which, had he possessed the wisdom of Solomon, he could not have settled. Notwithstanding this, he allowed himself to be named executor under both wills, qualified thereunder and has attempted, as the lower Court well and aptly said in its memorandum opinion, (App. 57), "to walk on both sides of the street at the same time." When the conflicts did arise he was requested to withdraw as executor of one or the other estate but refused to do so.

Having placed himself in this anomalous position, as should have been anticipated, irreconcilable conflicts arose between the parties at interest in the two estates which has resulted in appellees becoming enmeshed in protracted and costly litigation as the only means by which they could possibly protect their interests. This appeal brings before the Court some of these disputes. Another was before this Court in case No. 9274. The end of these litigated cases involving this Estate is not remotely in sight.

By the terms of Mrs. Buchholz's will (App. 2-3) after making specific cash bequests totalling \$24,500, one of which was to appellant's four children aggregating \$6,000.00, decedent, by Item XV of her will, specified that " * * * all the rest, residue and remainder of my property * * * I

direct my Executor * * * to reduce to cash and divide it equally among * * *” appellees. As directed by this provision of the will, appellant caused all of the assets, real and personal, to be sold for cash and the net proceeds of these sales came into the hands of the Executor.

By Item XVI of her will, the testatrix under the guidance of appellant, provided that her Executor “be allowed the maximum compensation permitted by law.” She did not direct in her will that her executor receive ten percent of the inventoried value of her estate. While it is true that the maximum commission which the Court by statute may allow in its discretion as commissions to an executor is ten percent, it was the position of appellees below, and is their position here, that a fair interpretation of decedent’s will did not divest the Court of its discretion in the manner of the application of the “maximum compensation permitted by law” in view of the statement of the Court in the case of *York v. Maryland Trust Co.* cited and relied upon by appellant in his brief, page 10, in which, with respect to the compensation to administrators and executors under the Maryland Statute, it is stated:

“* * * The whole matter is carried on under the direction and supervision of the orphan’s court, and under the direction vested in it by law that court is able, by regulating the amount of commissions, to compensate the executor or administrator in accordance with the skill and fidelity with which the estate has been administered. * * *”

In the above cited case the estate involved was heavily indebted and there was imposed upon the executor onerous duties in the preservation of the assets of the estate, while in the case at bar there were no such complications except those which the Executor here has brought about himself to the cost and detriment of appellees.

What was the effect of the provision of the will in this case directing the sale of all of her property and the

conversion of the same into cash? In *Vogt v. Vogt*, 26 App. D. C. 46, this Court has held that where real estate is required by a will to be converted into money it will be regarded as if it were money at the time of testator's death. And again in *Inglehart v. Inglehart*, 26 App. D. C. 209, 216-17, affirmed 204 U. S. 478, this Court held that an express direction in a will that the testator's real estate be sold on the death of the life tenant and the income of the proceeds used for a given purpose, operates to convert the property into personalty from the date of the death of the testator.

Applying these principles to the provisions of decedent's will, we find that the testatrix here provided for a conversion of all of the assets of her estate into cash so that at the date of her death her will was one of personalty. Under these circumstances the total value of decedent's estate was none other than the net value of her estate after the discharge of the trusts against the real property, the net proceeds to be derived from the sale of her stocks and bonds, such cash as she had on deposit to her credit in bank or building and loan associations and the net proceeds from the sale of her business. As a consequence, when testatrix, after providing for the sale of her assets, followed this with the provision that her executor be allowed "the maximum compensation permitted by law" it is logical to conclude that she intended that her executor's commissions be calculated upon the cash derived by him from the sale of her assets. It is clear under such circumstances, that she did not intend that "the maximum compensation permitted by law" be calculated upon gross inventory as is usual in a case where no mention is made of compensation to an executor in a will and the court is left the discretion to fix the compensation based upon the value of his services to the estate. In such case the Court can examine into the net funds derived, the responsibility imposed upon the Executor, the extent of his services and

how diligently and well he has served. In arriving at the rate of percentage allowable to an Executor the gross amount can be regulated by the court based on the inventory value in calculating the amount due.

The Court's attention is invited to the basis upon which appellant claimed his commission of ten percent in this case. In his second and second re-stated account (App. 23 and 46) he claimed commissions not on inventoried values, but based them upon his alleged disbursements represented at the date of the filing of the second re-stated account as \$321,558.90, whereas, his actual disbursements from the total proceeds from the sales of all of the assets of the estate which had all by then come into his hands was the sum of \$227,105.09. (App. 126) The difference between his actual disbursements and those set up in his account is made up of first trusts on real estate and other items which never reached his hands and which he did not pay and for which he was relieved of all responsibility of preserving or disbursing, and the sum of \$25,166.67 which a bank took from Mrs. Buchholz's account, prior to the appointment and qualification of the Executor, in payment of a note with interest due to and held by the bank. Having thus adopted a course of claiming commissions on disbursements, appellant now wishes to change his position in this Court and now urges that his commissions are to be calculated on the inventoried values. The accounts involved are not stated on inventory values but on fictitious disbursements.

At page 9 of his brief appellant relies upon the case of *Washington Loan & Trust Co. v. Convention of Protestant Episcopal Church, etc.*, 54 App. D. C. 14. He relied upon that case below, but the court held that it had no bearing on the issues. (App. 56) This case is inapposite. There the will provided for a fixed percentage of 5% on the net income of the estate as commissions for the Executor and later to the Trustee. The Executor accepted the trust and

qualified. Later, claiming that the commissions fixed by the will were not commensurate with the duties imposed upon it, the Executor sought to have this provision of the will declared void and for allowance of compensation as provided by law. This Court held that the Executor had accepted the trust under the will fully aware that the commissions were fixed at 5% of the net income and that it was bound by it. In the case at bar we have no fixed percentage of commission and we have an estate whose value is determined by the proceeds of the sale of its assets.

Moreover, here the facts establish that appellant has disregarded the residuary legatees whose interest he has failed to protect; that he has assumed a belligerent and litigious attitude towards them and has attempted to favor the estate of Fred W. Buchholz of which he is also co-executor; that he has put appellees to no end of annoyances, costs and expenses and has dragged out the settlement of this estate long beyond the time within which it should have been completely settled. He has on hand, as he admits (App. 60) undistributed in excess of \$100,000 in cash which is not invested, the greater portion of which belongs to appellees.

Yet appellant argues, notwithstanding all of these detrimental circumstances against him, that because the will of decedent provided that he should be allowed the maximum compensation permitted by law, that, whatever his actions are, the Court is powerless to regulate the orderly settlement of this Estate and the fixing of the compensation for the services rendered by him. If appellant be correct in his views, then the Court in a similar case could not reduce his commissions even though the executor refused to account solely because his compensation is fixed by a will. This cannot be the law of the District of Columbia.

The case of *Farmers Loan & Trust Co. v. Turner*, 1926, 151 N. E. 439, 242 N. Y. S. 240, relied upon by the Court

below (App. 53-54) is in point, sustains the court's opinion and should be decisive here. The lower Court's views are further sustained in *Re Bennett's Estate*, 38 N. Y. S. 945, holding that real estate authorized by will to be sold becomes personalty as of the time of the death of the testator, and under such circumstances an executor is entitled to commissions only on the net proceeds of the sale actually received and paid out by him. Further, *In re Marvin's Estate* (Cal.) Myers Probate 163, and *McNulty v. DeSansure*, 41 S. C. 457, 19 S. E. 926, it was held that where an executor sells incumbered real estate and only that part of the price in excess of incumbrances pass through his hands, he is entitled to commissions only on the latter sum.

While the lower court in its opinion did not touch upon many of the acts of the Executor against which appellees had complained, it would be well to point them out to the Court. Even though the amounts involved are comparatively small, they amply demonstrate the improper conduct of the appellant in the administration of this Estate. These established acts are as follows:—

a) In the business operated by the Executor he sold liquor at retail pursuant to a retail liquor license issued to him under the law and regulations in force in the District of Columbia. The Executor bought from himself at wholesale prices six cases of valuable bonded whiskey at a time when such liquor was difficult to get. In doing this he violated the provisions of his liquor license limited to retail sales by the drink, and also deprived the business of the profit which it would have made had this liquor been dispensed at retail. It is axiomatic that a fiduciary cannot deal with himself and the Courts have universally refused to countenance such practices.

b) During the course of the operation of the business by appellant he patronized the restaurant business which he operated and signed patron's checks for his purchases, the amounts due by him being posted on the books of the

business as accounts receivable. When appellees caused an audit to be made of the business it was found that heading the lists of accounts receivable was an item showing that "C. H. Doherty" was indebted to the business in the sum of \$32.10. Other accounts showed that he had signed food and bar chits totaling an additional \$202.83. These items were "killed" by charging the \$32.10 to a fictitious advertising account and the \$202.83 was disposed of by charging them to miscellaneous fictitious expenses. Neither of these items have been paid by appellant although he agreed to pay. (App. 94)

c) In the operation of the business appellant employed a manager named Simmons and a bookkeeper named Deaner. On February 1, 1946, the Executor sold the business as a going concern to Simmons and Deaner. Prior to the sale, while acting as appellant's bookkeeper, Deaner received a check for \$600.37 payable to Occidental Hotel and signed by Bryers Ice Cream Co. representing a refund or rebate on ice cream purchases by the business during the year 1945. Deaner did not deposit this check to the credit of the business, but kept it and later when he became proprietor he deposited the check to his account. When in the course of appellees' audit of the business this was discovered, the misappropriation was called to the Executor's attention without action on his part. It was only after appellees took exception to the second account and made proof of the facts that appellant forced Deaner to disgorge these funds.

d) In the preservation of their interests as residuary legatees, appellees were compelled to oppose appellant's first account wherein he sought to pay to himself as one of the co-executors of the Estate of Fred Buchholz an item of \$36,196.64, and to pay out of the funds of this Estate the balance due for the cost of burial of Fred Buchholz amounting to \$2,836.00. Both of these items were ordered stricken from the account as improper. The entire pro-

ceeding is shown in this court in case No. 9274 wherein an appeal to this court by the Executor was dismissed.

In his brief appellant argues that if commissions are not calculated on inventory, but limited to cash receipts and disbursements, this would exclude commissions on property distributed in kind. There is no soundness or logic in such argument. Appellant refuses to understand that the facts in this case are entirely different from those presented in a case where there is no means of ascertaining the value of the estate except from inventoried values. If property was not sold and delivered in kind it may be proper that it be accounted for and carried in the account as a credit against assets at inventoried value. It is not believed that the order of the Court below could be interpreted as excluding such items. Appellant argues further that if the statute had intended that commissions be calculated on disbursements it would have so provided instead of using the words "inventory" or "inventories". The statute used the words inventory and inventories in association with the discretion of the court in the allowance of commissions from 1% and not to exceed 10%. In the application of the statute, if the court found that inventory values were disproportionate to the net estate, it had the power in its discretion to arrive at a commission commensurate with the duties performed by adopting a percentage which would produce a gross commission in line with what the court deemer proper. But the statute could never have been intended to apply in a case as here presented in which the testatrix orders her property all reduced to cash and then provides for allowance of a commission to her executor of the maximum amount permitted by law. Even if, as the court below decided, it be resolved that "maximum compensation permitted by law" be construed to mean in this case ten per cent, then that ten percent should only be applied to the true value of the assets of this estate represented by the cash actually realized coming into the hands

of the executor from cash and the sale of its assets and disbursed by him.

For the reasons set forth by the court below in its memorandum opinion and in view of the additional decisions of the courts here cited the order of the court allowing commissions based on the valuation of the estate as shown by the cash received by appellant from cash and the sale of the assets and disbursed by him is correct and should be affirmed.

II. The Court Below Was Correct in Holding that Appellant as Executor Was not Entitled to Commissions on \$25,166.67 Which Was Never Delivered to Him but Which, Prior to His Appointment and Qualification, Was Taken by a Bank in Payment of Decedent's Due Note.

Some time prior to her death, in connection with the operation of her business, Mrs. Buchholz borrowed \$25,000 from the National Metropolitan Bank for which she issued her note with interest maturing January 28, 1945. Mrs. Buchholz died January 15, 1945. At the date of her death her balance in the business account in the National Metropolitan Bank was the sum of \$44,219.73. On its due date the bank paid to itself the principal and interest due on this note by reaching into her account and debiting it with \$25,166.67, leaving a balance to her credit of \$19,053.06. This latter sum was later delivered to appellant after he was appointed and qualified as Executor. At no time did the sum of \$25,166.67 ever come into the possession and under the administration of the Executor, and at no time did he ever receive from the bank from this account in excess of \$19,053.06. When appellant received the cancelled checks and debits against the account, the bank turned over to him the paid note. Knowing that he intended to claim ten per cent as his commission, appellant, after he qualified, charged himself and made it appear that he had received and that there was to the credit of decedent

in this bank the sum of \$44,219.73. In his first account he reported and charged himself with \$44,219.73 (App. 6) and later in the account he takes credit for an alleged disbursement to the National Metropolitan Bank of \$25,166.67 (App. 13) thus increasing his apparent disbursements by this amount, when as a matter of fact he never disbursed this sum at all. His ten per cent commission on this amount alone would be \$2,215.67. He never had charge of this sum, had no responsibility regarding it.

At page 8 of his brief, appellant states that he consented to the bank paying itself. Yet on the date when the bank reaching into the account and retired the note, appellant had not been appointed executor and had not qualified as such. When he was appointed, qualified and took possession of the balance on deposit in the bank he only received \$19,053.06. To be entitled to claim commissions on this \$25,166.67, the Executor, as he did not do, should have demanded that the bank turn over to him the total sum to the credit of decedent at the time of her death and then paid the note out of the funds delivered to him, in which case he would have had the responsibility of handling the funds and of paying them out. The only reason the note was filed with the Register of Wills was to make it appear, as it did, that appellant had actually handled the funds and paid the note. It was only when appellees audited appellant's accounts that this transaction was discovered and the true facts came to light.

Appellant argues in his brief at p. 8 that it was necessary for the Executor to account to the Court for this settlement to itself by the bank. The argument is fallacious in view of the facts. Appellant could have honestly reported the facts and by mere bookkeeping entries balanced his account. There was no justification for appellant to hide the facts as a means of claiming commissions on the sum in dispute.

In *Morisey v. Rogers*, 120 Ill. App. 37, under facts analo-

gous to those here, it was held that an administrator is not entitled to commissions on items which were not actually received by him, but which as a matter of bookkeeping might properly be included in his account.

It is submitted that the order below was proper and should be affirmed.

III. The Order of the Court Below Requiring Appellant to Pay Legal Interest on \$20,102.50 Appropriated in the Guise of Commissions on Account, Without Order of Court, Is Correct and Should Be Affirmed.

Without submission to the Court or an order authorizing him to do so, appellant, without the knowledge and consent of appellees, withdrew from his special Executor account in the Riggs National Bank, allegedly on account of commissions which he claimed would ultimately be due to him, the large sum of \$20,102.50. While the exact date of withdrawals are not shown of record, an audit of appellant's Executor account by appellees show that the aggregate was made up of withdrawals as follows: May 31, 1945—\$4,000.00; June 8, 1945—\$10,102.50; October 1, 1945—\$1,000.00; and January 9, 1946—\$5,000.00. This data of the amounts withdrawn and the dates of the withdrawals are taken from the Executor's cancelled checks and it is inconceivable that appellant would not readily admit the correctness of same.

From the above it will be seen that within four months after the date he qualified he had taken from the funds of the estate \$4,000.00. Within the year following his qualification on February 1, 1945, during which period the creditors of the estate had the right to file and probate their claims, he had appropriated to himself the whole of this \$20,102.50. Appellant well knew that it would be futile to apply to the Court for commissions on account as early as four months after his qualification and that there was no likelihood that the court would consider allowing commis-

sions on account within the year after his appointment, or at least until after his first account had been filed. The fact most damaging against appellant is that notwithstanding he had appropriated \$20,102.50 all prior to the date of filing his first account, which purported to show his receipts and disbursements and the actual cash on hand at the time, he did not report these withdrawals, so that as a matter of fact his cash on hand was not as actually reported but was deficient by the sum of \$20,102.50. This improper withdrawal of the funds of the estate came to appellees knowledge only when they caused an audit of appellant's accounts at about the time of the filing of the second account.

In the court below appellant attempted to justify his action on the ground that the commissions were a gift to him by decedent which he had a right to take at any time. He has not urged this here. However, his contention here, as it was below, is that the advance of commissions was known to counsel for appellees who allegedly stated he had no objection to such advances. (App. 113) As the record will show there is no proof of this fact. There appears of record a statement made by appellant in argument in the court below. The statement was not in response of appellant as a witness to a question by the Court or by counsel for appellees. Since it was a mere self-serving declaration, it was not deemed necessary that counsel for appellees refute it by testifying as to the conversation had with Mr. Doherty regarding his commissions. What actually occurred was this: Counsel for appellees was anxious to get before the court an interpretation of the provisions of the will regarding commissions to the Executor, and in a casual conversation with the Executor asked whether he intended applying to the Court for allowance of commissions on account. In answer, the Executor stated that he was attending to this and would take care of it. Counsel for appellees did not at any time consent to the Executor ap-

appropriating to himself any commissions and fully expected and anticipated that at the appropriate time application would be made to the Court for an allowance at which time he intended to oppose the allowance on the same basis as here advanced.

In support of this the Court will find that when appellees opposed the restated second account, the pleadings were prepared by appellees counsel and duly sworn to by one of the exceptors. The grounds for exception were then stated that the appropriations of commissions were without order of court, without their knowledge and consent and without statement thereof in his accounts. (App. 48).

There is no support in law or justifications otherwise for these actions of the executor. He well knew that appellees fully resented his attitude towards them by reason of his failure to protect their interests and the expense he was putting them to in an attempt to preserve their interests. He well knew that appellees would not have consented to any advancement of commissions. Although he secured the consent of appellees to many of his acts by insisting upon their written authority or approval, he not only failed to get their approval to the withdrawal of the funds of this estate in the guise of commissions, but hid from them the fact that he had done so.

In *Epperson v. Jackson*, 65 S. E. 217; 83 S. C. 151, it is held that allowance of interest on funds taken by an administrator without approval of the court, was within the discretion of the court. In *Wycoff v. O'Neil*, 67 A. 52; 72 N. J. Eq. 880, it was held that an Executor is not entitled to commissions until his accounts have been settled, and if he withdraws from the estate prior to settlement any money on account of such commissions he will be charged with interest thereon.

In ordering the Executor to pay legal interest on \$20,102.50 the court below in its opinion (App. 51-57)

clearly sets forth the law and the authorities in support thereof. The reasons stated there supports the correctness of this portion of the order appealed from and it should be affirmed.

CONCLUSION

It is respectfully submitted that in every respect the order appealed from was proper and correct and that the same should be affirmed with costs in this Court, the cost of preparing the record and printing of same should all be cast against Cornelius H. Doherty personally and individually. We pointedly refer to costs for the reason that in case No. 9274, between the same parties as are here before this Court, this executor took an appeal from an order of the lower court which was actually in his favor as Executor, but of course against his interests as co-executor of the Estate of Fred Buchholz. This appeal was dismissed by this Court on motion of the residuary legatees. Yet we find that the costs of the cited appeal—"Clerk, Court of Appeals \$35," and "Wilson-Epes Printing Co. for printing of the record, \$126.80" (App. 21) have been charged by Mr. Doherty to the Estate, whereas under the circumstances in that case, these costs should have been cast against Mr. Doherty in his individual capacity. Here the appeal is taken in an effort to reverse an order which affects the commission due an executor and interest due by the executor to the estate. If the judgment be affirmed, then it was correct in the first instance, and this estate should not have to bear the costs of Mr. Doherty's appeal.

PRENTICE E. EDRINGTON

Attorney for Appellees

438 Munsey Bldg.
Washington, D. C.

No. 9694

BRIEF OF APPELLEES

United States Court of Appeals

DISTRICT OF COLUMBIA

CORNELIUS H. DOHERTY, Executor of the Estate of
Christina Buchholz, deceased

Appellant,

vs.

LOUISE STONER, GUSTAV F. BLANK, and WILHELMINA
MERKLE, Committee for Frederick W. Merkle

Appellees.

Appeal from the District Court of the United States
for the District of Columbia

United States Court of Appeals
for the District of Columbia

FILED JAN 21 1948

Joseph W. Stewart
CLERK

PRENTICE E. EDRINGTON

438 Munsey Bldg.
Washington, D. C.

Attorney for Appellees

INDEX

	PAGE
Summary of Argument on Issues before the Court....	1
I. The decision of the District Court that commissions of 10% to the Executor, in this case, should be based on actual receipts and disbursements is correct	2
II. The court below was correct in holding that appellant, as Executor, was not entitled to commissions on \$25,166.67 which was never delivered to him but which, prior to his appointment and qualification, was taken by a bank in payment of decedent's due note	11
III. The order of the Court below requiring appellant to pay legal interest on \$20,102.50 appropriated in the guise of commissions on account, without order of court, is correct and should be affirmed..	13
Conclusion	16

CASES CITED

Bennett's Estate, 38 N. Y. S. 945	8
Epperson v. Jackson, 83 S. C. 151, 65 S. E. 217	15
Farmers Loan & Trust Co. v. Turner, (1926) 242 N. Y. Sup. 140, 151 N. E. 439	7
Inglehart v. Inglehart, 26 App. D. C. 209, 216-17	5
Marvin's Estate, (Cal.) Myers Probate 163	8
McNulty v. DeSanssure, 41 S. C. 457, 19 S. E. 926	8
Morisey v. Rogers, 120 Ill. App. 37	12
Vogt v. Vogt, 26 App. D. C. 46, 204 U. S. 478	5

	PAGE
Washington Loan & Trust Co. v. Convention of Protestant Episcopal Church, etc., 54 App. D. C. 14....	6
Wycoff v. O'Neil, 72 N. J. Eq. 880, 67 At. 52	15
York v. Maryland Trust Co., 150 Md. 354, 133 At. 128....	4

CASES REFERRED TO IN OPINION BELOW
NOTE CITED IN APPELLEES' BRIEF

Brosnan v. Fox, 1922, 52 App. D. C. 143	App. 55
Brown Estate, Adm. No. 40,601	App. 56
Lenman Estate, Adm. No. 41,501	App. 56
Maloney v. Foundry Methodist Episcopal Church 78 U. S. App. D. C. 263, 139 F. (2d) 388	App. 55

STATUTES REFERRED TO IN OPINION BELOW
NOT CITED IN APPELEES' BRIEF

D. C. Code, 1940 Ed., Sec. 20-605, 610	App. 54
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BRIEF OF APPELLEES

SUMMARY OF ARGUMENT ON ISSUES BEFORE THE COURT

There are here involved the correctness of the provisions of an order of the District Court, Holding a Probate Court, finding and ordering that:

- I. Commissions of ten per cent to appellant, as Executor, be restricted to actual receipts and disbursements;

- II. No commissions be allowed the Executor on the sum of \$25,166.67, representing the principal and interest due on a note of decedent which, prior to the date of the appointment and qualification of the Executor, was taken by a Bank, to whom the note was due, out of decedent's deposits in said bank, with the result that after the Executor qualified, the said bank only paid over to him the net balance to the credit of decedent.
 - III. The Executor had, without previous submission and order of the Court, improperly appropriated to himself out of the funds of the estate the sum of \$20,102.50 on account of ultimate commissions which might become due to him, and ordering the executor to pay legal interest thereon from the date said funds were taken to the date of the order allowing commissions.
-
- I. **The Decision of the District Court that Commissions of 10% to the Executor, in this Case, Should Be Based upon Actual Receipts and Disbursements, Is Correct, and Should Be Affirmed.**

Appellees are the sole residuary legatees under the last will of Christina Buchholz, deceased. Appellant is the sole executor of the will of Christina Buchholz, and contemporaneously, he is also co-executor under the will of Frederick W. Buchholz, son of Christina, who predeceased his mother by 54 calendar days. During their lifetime, mother and son had numerous business transactions with reference to a farm in Virginia, (the subject of a pending suit between the parties to this action) and also in connection with the operation of the well known Occidental Hotel & Restaurant in this City. The mother originally the owner of the Hotel and Restaurant business had transferred it to her son under a contract in writing by which it was agreed and understood that if he predeceased her all of said business would revert to her at his death. This

contract was before this Court for interpretation at the instance of the Executors of the Estate of Fred W. Buchholz as will at length appear in Case No. 9392 of the docket of this Court.

Appellant, an attorney, had served both the mother and son during their lifetime and up to the date of their respective deaths. He had prepared the son's will in which he was named co-executor. After the son's death he drafted a new will for the mother in which he allowed himself to be her sole executor. He was well aware that by reasons of the business transactions between the parties testate conflicts would inevitably arise which, had he possessed the wisdom of Solomon, he could not have settled. Notwithstanding this, he allowed himself to be named executor under both wills, qualified thereunder and has attempted, as the lower Court well and aptly said in its memorandum opinion, (App. 57), "to walk on both sides of the street at the same time." When the conflicts did arise he was requested to withdraw as executor of one or the other estate but refused to do so.

Having placed himself in this anomalous position, as should have been anticipated, irreconcilable conflicts arose between the parties at interest in the two estates which has resulted in appellees becoming enmeshed in protracted and costly litigation as the only means by which they could possibly protect their interests. This appeal brings before the Court some of these disputes. Another was before this Court in case No. 9274. The end of these litigated cases involving this Estate is not remotely in sight.

By the terms of Mrs. Buchholz's will (App. 2-3) after making specific cash bequests totalling \$24,500, one of which was to appellant's four children aggregating \$6,000.00, decedent, by Item XV of her will, specified that " * * * all the rest, residue and remainder of my property * * * I

direct my Executor * * * to reduce to cash and divide it equally among * * * appellees. As directed by this provision of the will, appellant caused all of the assets, real and personal, to be sold for cash and the net proceeds of these sales came into the hands of the Executor.

By Item XVI of her will, the testatrix under the guidance of appellant, provided that her Executor "be allowed the maximum compensation permitted by law." She did not direct in her will that her executor receive ten percent of the inventoried value of her estate. While it is true that the maximum commission which the Court by statute may allow in its discretion as commissions to an executor is ten percent, it was the position of appellees below, and is their position here, that a fair interpretation of decedent's will did not divest the Court of its discretion in the manner of the application of the "maximum compensation permitted by law" in view of the statement of the Court in the case of *York v. Maryland Trust Co.* cited and relied upon by appellant in his brief, page 10, in which, with respect to the compensation to administrators and executors under the Maryland Statute, it is stated:

"* * * The whole matter is carried on under the direction and supervision of the orphan's court, and under the direction vested in it by law that court is able, by regulating the amount of commissions, to compensate the executor or administrator in accordance with the skill and fidelity with which the estate has been administered. * * *"

In the above cited case the estate involved was heavily indebted and there was imposed upon the executor onerous duties in the preservation of the assets of the estate, while in the case at bar there were no such complications except those which the Executor here has brought about himself to the cost and detriment of appellees.

What was the effect of the provision of the will in this case directing the sale of all of her property and the

conversion of the same into cash? In *Vogt v. Vogt*, 26 App. D. C. 46, this Court has held that where real estate is required by a will to be converted into money it will be regarded as if it were money at the time of testator's death. And again in *Inglehart v. Inglehart*, 26 App. D. C. 209, 216-17, affirmed 204 U. S. 478, this Court held that an express direction in a will that the testator's real estate be sold on the death of the life tenant and the income of the proceeds used for a given purpose, operates to convert the property into personalty from the date of the death of the testator.

Applying these principles to the provisions of decedent's will, we find that the testatrix here provided for a conversion of all of the assets of her estate into cash so that at the date of her death her will was one of personalty. Under these circumstances the total value of decedent's estate was none other than the net value of her estate after the discharge of the trusts against the real property, the net proceeds to be derived from the sale of her stocks and bonds, such cash as she had on deposit to her credit in bank or building and loan associations and the net proceeds from the sale of her business. As a consequence, when testatrix, after providing for the sale of her assets, followed this with the provision that her executor be allowed "the maximum compensation permitted by law" it is logical to conclude that she intended that her executor's commissions be calculated upon the cash derived by him from the sale of her assets. It is clear under such circumstances, that she did not intend that "the maximum compensation permitted by law" be calculated upon gross inventory as is usual in a case where no mention is made of compensation to an executor in a will and the court is left the discretion to fix the compensation based upon the value of his services to the estate. In such case the Court can examine into the net funds derived, the responsibility imposed upon the Executor, the extent of his services and

how diligently and well he has served. In arriving at the rate of percentage allowable to an Executor the gross amount can be regulated by the court based on the inventory value in calculating the amount due.

The Court's attention is invited to the basis upon which appellant claimed his commission of ten percent in this case. In his second and second re-stated account (App. 23 and 46) he claimed commissions not on inventoried values, but based them upon his alleged disbursements represented at the date of the filing of the second re-stated account as \$321,558.90, whereas, his actual disbursements from the total proceeds from the sales of all of the assets of the estate which had all by then come into his hands was the sum of \$227,105.09. (App. 126) The difference between his actual disbursements and those set up in his account is made up of first trusts on real estate and other items which never reached his hands and which he did not pay and for which he was relieved of all responsibility of preserving or disbursing, and the sum of \$25,166.67 which a bank took from Mrs. Buchholz's account, prior to the appointment and qualification of the Executor, in payment of a note with interest due to and held by the bank. Having thus adopted a course of claiming commissions on disbursements, appellant now wishes to change his position in this Court and now urges that his commissions are to be calculated on the inventoried values. The accounts involved are not stated on inventory values but on fictitious disbursements.

At page 9 of his brief appellant relies upon the case of *Washington Loan & Trust Co. v. Convention of Protestant Episcopal Church, etc.*, 54 App. D. C. 14. He relied upon that case below, but the court held that it had no bearing on the issues. (App. 56) This case is inapposite. There the will provided for a fixed percentage of 5% on the net income of the estate as commissions for the Executor and later to the Trustee. The Executor accepted the trust and

qualified. Later, claiming that the commissions fixed by the will were not commensurate with the duties imposed upon it, the Executor sought to have this provision of the will declared void and for allowance of compensation as provided by law. This Court held that the Executor had accepted the trust under the will fully aware that the commissions were fixed at 5% of the net income and that it was bound by it. In the case at bar we have no fixed percentage of commission and we have an estate whose value is determined by the proceeds of the sale of its assets.

Moreover, here the facts establish that appellant has disregarded the residuary legatees whose interest he has failed to protect; that he has assumed a belligerent and litigious attitude towards them and has attempted to favor the estate of Fred W. Buchholz of which he is also co-executor; that he has put appellees to no end of annoyances, costs and expenses and has dragged out the settlement of this estate long beyond the time within which it should have been completely settled. He has on hand, as he admits (App. 60) undistributed in excess of \$100,000 in cash which is not invested, the greater portion of which belongs to appellees.

Yet appellant argues, notwithstanding all of these detrimental circumstances against him, that because the will of decedent provided that he should be allowed the maximum compensation permitted by law, that, whatever his actions are, the Court is powerless to regulate the orderly settlement of this Estate and the fixing of the compensation for the services rendered by him. If appellant be correct in his views, then the Court in a similar case could not reduce his commissions even though the executor refused to account solely because his compensation is fixed by a will. This cannot be the law of the District of Columbia.

The case of *Farmers Loan & Trust Co. v. Turner*, 1926, 151 N. E. 439, 242 N. Y. S. 240, relied upon by the Court

below (App. 53-54) is in point, sustains the court's opinion and should be decisive here. The lower Court's views are further sustained in *Re Bennett's Estate*, 38 N. Y. S. 945, holding that real estate authorized by will to be sold becomes personalty as of the time of the death of the testator, and under such circumstances an executor is entitled to commissions only on the net proceeds of the sale actually received and paid out by him. Further, *In re Marvin's Estate* (Cal.) Myers Probate 163, and *McNulty v. DeSansure*, 41 S. C. 457, 19 S. E. 926, it was held that where an executor sells incumbered real estate and only that part of the price in excess of incumbrances pass through his hands, he is entitled to commissions only on the latter sum.

While the lower court in its opinion did not touch upon many of the acts of the Executor against which appellees had complained, it would be well to point them out to the Court. Even though the amounts involved are comparatively small, they amply demonstrate the improper conduct of the appellant in the administration of this Estate. These established acts are as follows:—

a) In the business operated by the Executor he sold liquor at retail pursuant to a retail liquor license issued to him under the law and regulations in force in the District of Columbia. The Executor bought from himself at wholesale prices six cases of valuable bonded whiskey at a time when such liquor was difficult to get. In doing this he violated the provisions of his liquor license limited to retail sales by the drink, and also deprived the business of the profit which it would have made had this liquor been dispensed at retail. It is axiomatic that a fiduciary cannot deal with himself and the Courts have universally refused to countenance such practices.

b) During the course of the operation of the business by appellant he patronized the restaurant business which he operated and signed patron's checks for his purchases, the amounts due by him being posted on the books of the

business as accounts receivable. When appellees caused an audit to be made of the business it was found that heading the lists of accounts receivable was an item showing that "C. H. Doherty" was indebted to the business in the sum of \$32.10. Other accounts showed that he had signed food and bar chits totaling an additional \$202.83. These items were "killed" by charging the \$32.10 to a fictitious advertising account and the \$202.83 was disposed of by charging them to miscellaneous fictitious expenses. Neither of these items have been paid by appellant although he agreed to pay. (App. 94)

c) In the operation of the business appellant employed a manager named Simmons and a bookkeeper named Deaner. On February 1, 1946, the Executor sold the business as a going concern to Simmons and Deaner. Prior to the sale, while acting as appellant's bookkeeper, Deaner received a check for \$600.37 payable to Occidental Hotel and signed by Bryers Ice Cream Co. representing a refund or rebate on ice cream purchases by the business during the year 1945. Deaner did not deposit this check to the credit of the business, but kept it and later when he became proprietor he deposited the check to his account. When in the course of appellees' audit of the business this was discovered, the misappropriation was called to the Executor's attention without action on his part. It was only after appellees took exception to the second account and made proof of the facts that appellant forced Deaner to disgorge these funds.

d) In the preservation of their interests as residuary legatees, appellees were compelled to oppose appellant's first account wherein he sought to pay to himself as one of the co-executors of the Estate of Fred Buchholz an item of \$36,196.64, and to pay out of the funds of this Estate the balance due for the cost of burial of Fred Buchholz amounting to \$2,836.00. Both of these items were ordered stricken from the account as improper. The entire pro-

ceeding is shown in this court in case No. 9274 wherein an appeal to this court by the Executor was dismissed.

In his brief appellant argues that if commissions are not calculated on inventory, but limited to cash receipts and disbursements, this would exclude commissions on property distributed in kind. There is no soundness or logic in such argument. Appellant refuses to understand that the facts in this case are entirely different from those presented in a case where there is no means of ascertaining the value of the estate except from inventoried values. If property was not sold and delivered in kind it may be proper that it be accounted for and carried in the account as a credit against assets at inventoried value. It is not believed that the order of the Court below could be interpreted as excluding such items. Appellant argues further that if the statute had intended that commissions be calculated on disbursements it would have so provided instead of using the words "inventory" or "inventories". The statute used the words inventory and inventories in association with the discretion of the court in the allowance of commissions from 1% and not to exceed 10%. In the application of the statute, if the court found that inventory values were disproportionate to the net estate, it had the power in its discretion to arrive at a commission commensurate with the duties performed by adopting a percentage which would produce a gross commission in line with what the court deemed proper. But the statute could never have been intended to apply in a case as here presented in which the testatrix orders her property all reduced to cash and then provides for allowance of a commission to her executor of the maximum amount permitted by law. Even if, as the court below decided, it be resolved that "maximum compensation permitted by law" be construed to mean in this case ten per cent, then that ten percent should only be applied to the true value of the assets of this estate represented by the cash actually realized coming into the hands

of the executor from cash and the sale of its assets and disbursed by him.

For the reasons set forth by the court below in its memorandum opinion and in view of the additional decisions of the courts here cited the order of the court allowing commissions based on the valuation of the estate as shown by the cash received by appellant from cash and the sale of the assets and disbursed by him is correct and should be affirmed.

II. The Court Below Was Correct in Holding that Appellant as Executor Was not Entitled to Commissions on \$25,166.67 Which Was Never Delivered to Him but Which, Prior to His Appointment and Qualification, Was Taken by a Bank in Payment of Decedent's Due Note.

Some time prior to her death, in connection with the operation of her business, Mrs. Buchholz borrowed \$25,000 from the National Metropolitan Bank for which she issued her note with interest maturing January 28, 1945. Mrs. Buchholz died January 15, 1945. At the date of her death her balance in the business account in the National Metropolitan Bank was the sum of \$44,219.73. On its due date the bank paid to itself the principal and interest due on this note by reaching into her account and debiting it with \$25,166.67, leaving a balance to her credit of \$19,053.06. This latter sum was later delivered to appellant after he was appointed and qualified as Executor. At no time did the sum of \$25,166.67 ever come into the possession and under the administration of the Executor, and at no time did he ever receive from the bank from this account in excess of \$19,053.06. When appellant received the cancelled checks and debits against the account, the bank turned over to him the paid note. Knowing that he intended to claim ten per cent as his commission, appellant, after he qualified, charged himself and made it appear that he had received and that there was to the credit of decedent

in this bank the sum of \$44,219.73. In his first account he reported and charged himself with \$44,219.73 (App. 6) and later in the account he takes credit for an alleged disbursement to the National Metropolitan Bank of \$25,166.67 (App. 13) thus increasing his apparent disbursements by this amount, when as a matter of fact he never disbursed this sum at all. His ten per cent commission on this amount alone would be \$2,215.67. He never had charge of this sum, had no responsibility regarding it.

At page 8 of his brief, appellant states that he consented to the bank paying itself. Yet on the date when the bank reaching into the account and retired the note, appellant had not been appointed executor and had not qualified as such. When he was appointed, qualified and took possession of the balance on deposit in the bank he only received \$19,053.06. To be entitled to claim commissions on this \$25,166.67, the Executor, as he did not do, should have demanded that the bank turn over to him the total sum to the credit of decedent at the time of her death and then paid the note out of the funds delivered to him, in which case he would have had the responsibility of handling the funds and of paying them out. The only reason the note was filed with the Register of Wills was to make it appear, as it did, that appellant had actually handled the funds and paid the note. It was only when appellees audited appellant's accounts that this transaction was discovered and the true facts came to light.

Appellant argues in his brief at p. 8 that it was necessary for the Executor to account to the Court for this settlement to itself by the bank. The argument is fallacious in view of the facts. Appellant could have honestly reported the facts and by mere bookkeeping entries balanced his account. There was no justification for appellant to hide the facts as a means of claiming commissions on the sum in dispute.

In *Morisey v. Rogers*, 120 Ill. App. 37, under facts analo-

gous to those here, it was held that an administrator is not entitled to commissions on items which were not actually received by him, but which as a matter of bookkeeping might properly be included in his account.

It is submitted that the order below was proper and should be affirmed.

III. The Order of the Court Below Requiring Appellant to Pay Legal Interest on \$20,102.50 Appropriated in the Guise of Commissions on Account, Without Order of Court, Is Correct and Should Be Affirmed.

Without submission to the Court or an order authorizing him to do so, appellant, without the knowledge and consent of appellees, withdrew from his special Executor account in the Riggs National Bank, allegedly on account of commissions which he claimed would ultimately be due to him, the large sum of \$20,102.50. While the exact date of withdrawals are not shown of record, an audit of appellant's Executor account by appellees show that the aggregate was made up of withdrawals as follows: May 31, 1945—\$4,000.00; June 8, 1945—\$10,102.50; October 1, 1945—\$1,000.00; and January 9, 1946—\$5,000.00. This data of the amounts withdrawn and the dates of the withdrawals are taken from the Executor's cancelled checks and it is inconceivable that appellant would not readily admit the correctness of same.

From the above it will be seen that within four months after the date he qualified he had taken from the funds of the estate \$4,000.00. Within the year following his qualification on February 1, 1945, during which period the creditors of the estate had the right to file and probate their claims, he had appropriated to himself the whole of this \$20,102.50. Appellant well knew that it would be futile to apply to the Court for commissions on account as early as four months after his qualification and that there was no likelihood that the court would consider allowing commis-

sions on account within the year after his appointment, or at least until after his first account had been filed. The fact most damaging against appellant is that notwithstanding he had appropriated \$20,102.50 all prior to the date of filing his first account, which purported to show his receipts and disbursements and the actual cash on hand at the time, he did not report these withdrawals, so that as a matter of fact his cash on hand was not as actually reported but was deficient by the sum of \$20,102.50. This improper withdrawal of the funds of the estate came to appellees knowledge only when they caused an audit of appellant's accounts at about the time of the filing of the second account.

In the court below appellant attempted to justify his action on the ground that the commissions were a gift to him by decedent which he had a right to take at any time. He has not urged this here. However, his contention here, as it was below, is that the advance of commissions was known to counsel for appellees who allegedly stated he had no objection to such advances. (App. 113) As the record will show there is no proof of this fact. There appears of record a statement made by appellant in argument in the court below. The statement was not in response of appellant as a witness to a question by the Court or by counsel for appellees. Since it was a mere self-serving declaration, it was not deemed necessary that counsel for appellees refute it by testifying as to the conversation had with Mr. Doherty regarding his commissions. What actually occurred was this: Counsel for appellees was anxious to get before the court an interpretation of the provisions of the will regarding commissions to the Executor, and in a casual conversation with the Executor asked whether he intended applying to the Court for allowance of commissions on account. In answer, the Executor stated that he was attending to this and would take care of it. Counsel for appellees did not at any time consent to the Executor ap-

appropriating to himself any commissions and fully expected and anticipated that at the appropriate time application would be made to the Court for an allowance at which time he intended to oppose the allowance on the same basis as here advanced.

In support of this the Court will find that when appellees opposed the restated second account, the pleadings were prepared by appellees counsel and duly sworn to by one of the exceptors. The grounds for exception were then stated that the appropriations of commissions were without order of court, without their knowledge and consent and without statement thereof in his accounts. (App. 48).

There is no support in law or justifications otherwise for these actions of the executor. He well knew that appellees fully resented his attitude towards them by reason of his failure to protect their interests and the expense he was putting them to in an attempt to preserve their interests. He well knew that appellees would not have consented to any advancement of commissions. Although he secured the consent of appellees to many of his acts by insisting upon their written authority or approval, he not only failed to get their approval to the withdrawal of the funds of this estate in the guise of commissions, but hid from them the fact that he had done so.

In *Epperson v. Jackson*, 65 S. E. 217; 83 S. C. 151, it is held that allowance of interest on funds taken by an administrator without approval of the court, was within the discretion of the court. In *Wycoff v. O'Neil*, 67 A. 52; 72 N. J. Eq. 880, it was held that an Executor is not entitled to commissions until his accounts have been settled, and if he withdraws from the estate prior to settlement any money on account of such commissions he will be charged with interest thereon.

In ordering the Executor to pay legal interest on \$20,102.50 the court below in its opinion (App. 51-57)

clearly sets forth the law and the authorities in support thereof. The reasons stated there supports the correctness of this portion of the order appealed from and it should be affirmed.

CONCLUSION

It is respectfully submitted that in every respect the order appealed from was proper and correct and that the same should be affirmed with costs in this Court, the cost of preparing the record and printing of same should all be cast against Cornelius H. Doherty personally and individually. We pointedly refer to costs for the reason that in case No. 9274, between the same parties as are here before this Court, this executor took an appeal from an order of the lower court which was actually in his favor as Executor, but of course against his interests as co-executor of the Estate of Fred Buchholz. This appeal was dismissed by this Court on motion of the residuary legatees. Yet we find that the costs of the cited appeal—"Clerk, Court of Appeals \$35," and "Wilson-Epes Printing Co. for printing of the record, \$126.80" (App. 21) have been charged by Mr. Doherty to the Estate, whereas under the circumstances in that case, these costs should have been cast against Mr. Doherty in his individual capacity. Here the appeal is taken in an effort to reverse an order which affects the commission due an executor and interest due by the executor to the estate. If the judgment be affirmed, then it was correct in the first instance, and this estate should not have to bear the costs of Mr. Doherty's appeal.

PRENTICE E. EDRINGTON

Attorney for Appellees

438 Munsey Bldg.
Washington, D. C.

No. 9694

REPLY BRIEF FOR APPELLANT

United States Court of Appeals

DISTRICT OF COLUMBIA

CORNELIUS H. DOHERTY, Executor of the Estate of
Christina Buchholz, Deceased, *Appellant*,

v.

LOUISE STONER, GUSTAV F. BLANK AND WILHELMINA MERKLE,
Committee of Frederick W. Merkle, *Appellees*.

**Appeal from District Court of the United States
for the District of Columbia**

*United States Court of Appeals
for the District of Columbia*

FILED APR 3 1948

Joseph W. Stewart
CLERK

SPENCER GORDON,
ELEANOR SESSOMS,
Union Trust Building
Washington 5, D. C.
Attorneys for Appellant

INDEX

	PAGE
The issues	1
The bank account	3
Sales of real estate	6
Interest on advances	8

CASES

Farmers Loan and Trust Company v. Turner, 151 N. E. 439, 242 N. Y. S. 240	7
Fernald v. Gooch, 202 Mass. 408, 88 N. E. 763	8
Harrison v. Perea, 168 U. S. 311	5, 7
Hutchins v. Hutchins, 48 App. D. C. 286	4
In re Ellis' Estate, 66 Ohio App. 121, 32 N. E. (2d) 23..	8
In re Pringle's Estate, 51 Wyo. 352, 67 P. (2d) 204....	6, 7
Jaeger v. Bowery Bank, 8 Misc. 150, 29 N. Y. S. 303....	4
Jordon v. National Shoe & Leather Bank, 74 N. Y. 467, 30 Am. Rep. 319	4
Nunns v. Begun, 134 Misc. 470, 235 N. Y. Supp. 675 (1929)	4
Tuohy v. Hanlon, 18 App. D. C. 225	3, 4
Washington Loan and Trust Co. v. Convention of Protestant Episcopal Church, 54 App. D. C. 14, 293 Fed. 833	8
York v. Maryland Trust Company, 150 Md. 354, 133 Atl. 128	7

STATUTES

D. C. Code, 1940, §20-605	4, 5, 7
D. C. Code, 1940, §16-1908	4
New York Civil Practice Act, Sec. 269	4
New York Surrogate's Court Act, Sec. 285	7

TEXTBOOK

Mersch, Probate Court Practice, 305, 306	8
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REPLY BRIEF FOR APPELLANT

The Issues

In what seems to be an effort to excite prejudice against Mr. Doherty, the brief filed by the appellees makes a general attack on his conduct as executor. This finds little support in the record, and is immaterial to the present issues.

By the terms of the will he was to be "allowed the maximum compensation permitted by law."

The primary point made below by the appellees was that the executor was not entitled to a ten per cent commission. In their exceptions they urged that the provision in the will in that regard was not binding on the Court, and that the commissions claimed were "excessive" because of conflict of interest between the estate of the mother and son, because the executor failed to cooperate, etc., etc., very much as in their present brief.* (24) The Court below stated the issues as follows:

"The exceptants say the executor is not entitled to such commissions for three reasons:

- 1.) Because of the conflicting interests between the estates of mother and son;
- 2.) The Will provision referred to is not binding on the Court; and
- 3.) The actual amount the executor is alleged to have disbursed is not correct." (52)

The Court discussed the conflicting interests and the acts of the executor which had been questioned, and held:

"Yet in the absence of malfeasance or misfeasance,—and neither is here charged—and having in mind the fact that so far as the son's estate is concerned, he was acting jointly with a corporate co-executor, there is no controlling objection in either of the first two reasons advanced for denial of the commissions." (53)

This was certainly a clear decision that there had been nothing in the conduct of the executor which required the Court to do anything except follow the directions of the will, and that the executor was entitled to a commission of ten per cent, "the maximum compensation permitted by law." If the Court below had any discretion to allow less than ten per cent such discretion was exercised by allowing that sum, but the decision below seems rather

* For a statement of Mr. Doherty's position thereon see (31-43). References in parentheses are to the joint appendix unless otherwise indicated.

that the Court simply followed the will and allowed "the maximum compensation permitted by law," to-wit ten per cent. There has been no appeal or cross appeal from this part of the decision.

The Court below said further:

"It is well to note and, as observed above, the exceptants frankly state they are raising no question of the respondent's personal integrity but take the position that certain items charged as such are not proper and, therefore, his disbursements and, as a consequence, his commissions should be less than those claimed." (53)

In the face of this statement, the shots at Mr. Doherty, which the appellees have fired in all directions in their present brief, should not divert the Court from the definite questions of law involved in this appeal, which are merely:

1. Should the executor be allowed commissions on \$44,219.73 which was in the testatrix's bank account when she died, or merely on the net amount thereof remaining after the bank paid itself a note which came due before the executor qualified?

2. Should the executor be allowed commissions on the full price of real estate which he sold, or merely on the part thereof remaining after the title company had paid off the trusts and expenses?

3. Should the executor be required to pay interest at six per cent, because he had taken commissions within the amount specified in the will but before his account was approved, in the absence of a showing of any damage to the estate?

The Bank Account

In *Tuohy v. Hanlon*, 18 App. D. C. 225, counsel fees and costs incurred in the unsuccessful defense of a will

were allowed to executors named therein, although it was never admitted to probate, the Court saying:

“* * * it must be regarded as settled law with us that an executor * * * derives his interest in the estate of the deceased entirely from the will, and becomes vested with that interest from the moment of the testator's death. He may do many things which an administrator is not entitled to do; as, for example, to bury the deceased in a manner suitable to the estate which has been left. In fact, the great commentator on English law, at the place above cited, 2 Com. 507, says that he can do most of the things before the probate of the will which he may do afterwards”

This statement was repeated with approval in *Hutchins v. Hutchins*, 48 App. D. C. 286.

The bank account was part of the estate of Mrs. Buchholz, and the executor became “vested with that interest” from the moment of her death. Clearly it should have been included in his inventory. And in this jurisdiction commissions are allowed “on the amount of the inventory or inventories, excluding what is lost or perished.” D. C. Code 1940, 20-605.

The decision below is based on the form of the transaction, not the substance. If the executor had required the bank to hold the account in statu quo until he qualified * so that the executor received the full account of \$44,219.43, the Court below apparently would have allowed commissions thereon, although such delay would have subjected the estate to additional interest when the note was paid.

The appellees urge (brief p. 10) that there is some significance in the fact that Mr. Doherty in his account

* As the note was not due at the time of Mrs. Buchholz's death the bank had no right of set-off. *Jaeger v. Bowery Bank*, 8 Misc. 150, 29 N. Y. S. 303; *Jordan v. National Shoe & Leather Bank*, 74 N. Y. 467, 30 Am. Rep. 319. See *Nunns v. Begun*, 134 Misc. 470, 235 N. Y. Supp. 675, 676 (1929). The New York statute on set-offs (now Civil Practice Act, Sec. 269) in those cases is like D. C. Code 1940, Sec. 16-1908.

asked merely for ten per cent of his disbursements (23), instead of ten per cent of his inventories. This was obviously done because the account was not a final one. Under the statute commissions are based on inventories. D. C. Code, 1940, 20-605. There can be no other basis. In his "second account", however, Mr. Doherty did not claim commissions on his entire inventory because there was an undisbursed balance which was to be the subject of a further account (23). A precise statement would perhaps be that Mr. Doherty was entitled, under the will and the statute, to a commission equal to ten per cent of his inventory, but that he limited the basis of his claim at the time of his second account to such part of his inventory as had been disbursed. This conservative method of stating his account certainly could not reduce the right to commissions given him by the will and the statute.

That the substance of such transactions should govern rather than the form is shown in *Harrison v. Perea*, 168 U. S. 311. There an administrator of a New Mexico decedent had obtained a judgment against a defendant who had converted the entire assets of the estate. The defendant was ordered to turn the property over to the administrator, except a certain part thereof to which he would be entitled on distribution. The administrator was then allowed his statutory commissions upon the entire assets of the estate including its gross amount due from the defendant, in spite of a claim that he was "not entitled to commission on any other sum than that which he actually receives and pays out." This part of the decree was affirmed by the Supreme Court, which held that the administrator was entitled to

" * * * the full amount of the commissions * * * which he would have been entitled to had the money which the defendant retained been actually and physically paid over into his hands." (p. 325)

In the same way, we respectfully submit that Mr. Doherty is entitled to commissions on the \$44,219.73 which

was in the bank account as he would undoubtedly have been had the money been paid to him and used by him to pay the note.

A somewhat similar case was *In re Pringle's Estate*, 51 Wyo. 352, 67 P. (2d) 204. There an estate had some \$26,000 deposited in a bank and also owned 50 shares of the bank's stock of the par value of \$5,000. The bank failed. The State Bank Examiner thereafter paid on the executor's claim dividends totalling \$7,992.48, but retained \$5,000 of this amount in payment of the statutory stockholder's liability on the stock, and the balance of \$2,992.48 was paid to the executor of the estate.

"It is contended for the appellant executor that the court did not allow commissions upon that part of the dividends evidenced by the \$5,000 retained by the State Examiner to liquidate the liability on the bank stock. If that is so, then commissions should be awarded thereon, for regardless of the system of book-keeping that amount was paid to the person legally entitled to receive it, i. e., the State Examiner, and hence was accounted for by the executor in our view of the transaction. . . ."

Sales of Real Estate

The Court below also disallowed, as a basis for commissions, that part of the sale price of the real estate which was applied by the title company to the payment of encumbrances on the real estate and expenses of the sales. This decision again was based on the form of the transaction and not upon its substance. The Court thus said:

"2.) The charge as commission on the \$20,000 trust encumbrance on the real estate is improper. The commission of an executor in such a transaction is limited to the actual net receipt. It would be different if he actually received the whole price and by his own check paid off the encumbrance. (See

Farmers Loan and Trust Company v. Turner, 1926, 151 N. E. 439, 440; 242 N. Y. S. 240). This item is disallowed." (53-54)*

There is no more reason for the form of the transaction to control in the sales of real estate than in the case of the bank account. Mr. Doherty followed the usual practice. If he had used other funds of the estate to pay off the encumbrances, thereby receiving from the title company the full amount of the sale price in cash, the Court below says that "it would have been different." This, we respectfully submit, cannot be the law. It is certainly contrary to the decision of the Supreme Court in the case of *Harrison v. Perea*, *supra.*, and to the holding of *In re Pringle's Estate*, *supra.*

This case is not controlled by the decision in *Farmers Loan and Trust Company v. Turner*, 151 N. E. 439, 242 N. Y. S. 240, relied on by the Court below and by the appellees in their present brief, or by any of the other decisions from various jurisdictions cited by appellees. Probate law is a matter of statute in every jurisdiction, and apparently in New York commissions are allowed "for receiving and paying out all sums of money." New York Surrogate's Court Act, Section 285. It is not unreasonable that such a statute may receive a different construction from our statute, which allows commissions "on the amount of the inventory or inventories, excluding what is lost or perished." District of Columbia Code 1940, 20-605. It has been the established practice in Maryland, from which our probate law is derived, to allow commissions on the gross estate regardless of debts. *York v. Maryland Trust Company*, 150 Md. 354, 133 Atl. 128. And in the District of Columbia the proceeds of real estate

* Although the Court speaks only of "the \$20,000 trust encumbrance", other sales of real estate were involved as set forth in the account (8, 14, 15). The order restricting commissions "to the actual net cash received by the executor and disbursed by him" (58) applies to all such sales, and to all expenses connected therewith which were paid by the title company from the sale price.

sold are included in such inventories. Mersch, *Probate Court Practice*, 305, 306.

The problem here is not to determine what is a reasonable commission to Mr. Doherty. If that problem was ever in this case, which we deny in view of the terms of the will, it was settled by the Court below holding that Mr. Doherty's claim to ten per cent should not be denied (53). This left only the question of fixing the base on which Mr. Doherty should "be allowed the maximum compensation permitted by law" as provided in the will (4). This, we submit, should be determined by the substance of the transactions, and not by their form. Otherwise, executors will be invited to subject estates to cumbersome and perhaps expensive procedures, in order to insure that cash, rather than credit, will always go through the hands of the executor.

Interest on Advances

The executor knew that he would be entitled to a ten per cent commission under the will. He took a part of this commission before his account was approved.

The executor stated in the lower court that this was with the approval of counsel for the appellees (113), although counsel for the appellees now puts a different construction on the conversation (brief p. 14).

In any event the executor could rely on the fact that he would ultimately receive the ten per cent, as the will so provided and the law is well settled that such an instruction is binding on the court. *Washington Loan and Trust Co. v. Convention of Protestant Episcopal Church*, 54 App. D. C. 14, 293 Fed. 833; *In re Ellis' Estate*, 66 Ohio App. 121, 32 N. E. (2d) 23; *Fernald v. Gooch*, 202 Mass. 408, 88 N. E. 763. We respectfully submit that the case is entirely different from one where an executor has

advanced to himself commissions which may not ultimately be allowed.

An executor does not ordinarily invest funds of an estate, and there is no showing that the estate was injured in any way. The assessment of theoretical damages at six per cent seems unjustified.

Respectfully submitted,

SPENCER GORDON,
ELEANOR SESSOMS,
Union Trust Building
Washington 5, D. C.

Attorneys for Appellant